TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, ADMINISTRATOR, ET AL.,
PETITIONERS,

vs.

TRANSOCEAN AIR LINES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1960
CERTIORARI GRANTED JUNE 27, 1960

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Docket Entries

UNITED STATES DISTRICT COURT

Civil Docket 139-342

Jury demand date: by Pltff. 11/7/58

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant

—vs—

TRANSOCEAN AIR LINES

For plaintiff:

Speiser Quinn & O'Brien (6-9-59)
290 Madison Ave. NY 17

For defendant:

Haight Gardner Poor & Havens
80 Broad St. NY 4

—B—

Nov.	7-58	Filed complaint and issued summons.
Nov.	7-58	Filed Petition & Order for appointment of Guardian Ad Litem. Kaufman, J.
Nov.	13-58	Filed summons & return. Served deft. 11-13-58.
Nov.	28-58	Filed Notice of appearance of attys for deft
Feb.	6-59	Filed ANSWER of deft
Feb.	9-59	Filed Affdvt & Notice of motion for summary judgment. Ret. 2-24-59

Docket Entries

Apr.	Filed Stip. and Order adjourning return date of motion to 5-7-59. Palmieri, J.
May 14-59	Filed Affdvt of Pltff in opposition to motion Re: Summary judgment.
May 14-59	Filed Deft's reply affdvt.
May 14-59	Filed Opinion #25122. Deft's motion for summary judgment is granted. Levet, J. (Clerk's judgment endorsed thereon. Mailed notice of entry 5-14-59.
June 9-59	Filed Notice of change of address & firm name of pltff's attorneys
June 12-59	Filed Notice of Appeal—Mailed copy to Haight Gardner Poor & Havens

(Seal)

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ 139-342

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs,

—against—

TRANSOCEAN AIR LINES,

Defendant.

PLAINTIFFS DEMAND A TRIAL BY JURY

Plaintiffs, complaining of the defendant, by their attorneys, Speiser & O'Brien, respectfully show and allege as follows:

For a First Cause of Action on Behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased:

1. That heretofore and prior to the commencement of this action and on or about the 18th day of February, 1958, Letters of Administration were duly issued to Robert F. Nolan upon the Estate of Jasper Wallace Hall, deceased, by order of the Probate Court, County of Charleston, State of South Carolina, and that thereafter the said Robert F. Nolan duly qualified as such Administrator, entered upon his duties and is now acting as such.

2. Jurisdiction hereunder is based on diversity of citizenship and amount. Plaintiff Robert F. Nolan is a citizen and resident of the State of New York.

3. Upon information and belief, that at all the times hereinafter mentioned the defendant was and is a corporation incorporated and existing under and by virtue of the laws of the State of California.

4. Upon information and belief, that at all the times hereinafter mentioned the defendant maintained its principal place of business in the State of California.

5. That the amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars.

6. That the said defendant is and at all the times hereinafter mentioned was engaged in business and doing business in the Southern District of New York.

7. That the said defendant is and at all the times hereinafter mentioned was a common carrier engaged in the business of transporting passengers for hire by airplane between various points in the United States, including the States of New York and California.

8. Upon information and belief that at all the times hereinafter mentioned the defendant in the conduct of its said business owned a certain DC-4 airplane bearing registration number N88942.

9. Upon information and belief that at all the times hereinafter mentioned the defendant in the conduct of its said business was the lessee of a certain DC-4 airplane bearing registration number N88942.

10. That at all the times hereinafter mentioned the defendant in the conduct of its said business operated said airplane.

11. That at all the times hereinafter mentioned the defendant in the conduct of its said business maintained said airplane.

12. That at all the times hereinafter mentioned the defendant in the conduct of its said business controlled said airplane.

13. Upon information and belief that on or about March 20, 1953, the defendant during the course of its said business

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operated that certain air trip or flight designated as Transocean Air Lines' Flight 942, from Roswell, New Mexico in a westerly direction toward Oakland, California.

14. That on or about March 20, 1953, the defendant operated that certain DC-4 airplane, bearing registration number N88942, under the designation of Transocean Air Lines' Flight 942.

15. That on or about March 20, 1953, the decedent, Jasper Wallace Hall, was a passenger lawfully aboard said defendant's airplane N88942 and designated as Transocean Air Lines Flight 942.

16. Upon information and belief that at all the times hereinafter mentioned, and while said Jasper Wallace Hall was being transported and conveyed as such passenger in said airplane, the said airplane was then and there owned, leased, operated and maintained by and under the exclusive control of the defendant, through one or more of its agents, servants and employees, and that such agents, servants

and employees of the defendant were operating the said airplane in and about the discharge of their duties as such agents, servants and employees, within the scope of their employment and authority as such, and over whom the said Jasper Wallace Hall had no supervision or control.

17. Upon information and belief that while said airplane was owned, leased, operated, maintained and controlled by the defendant as aforesaid, and while the said Jasper Wallace Hall was a passenger on said airplane as aforesaid, the said airplane on March 20, 1953, at or in the vicinity of Alvarado, California, crashed to the ground.

18. That by reason of the foregoing crash, and as a direct result thereof, the said Jasper Wallace Hall sustained injuries as a result of which he died.

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19. That the said crash and death of Jasper Wallace Hall was caused by the negligence of the defendant Transocean Air Lines in the ownership, management, operation, maintenance and control of the aforesaid airplane.

20. That the crash and death of Jasper Wallace Hall was caused without any fault or lack or care on the part of the decedent, Jasper Wallace Hall, contributing thereto in any manner whatsoever.

21. Upon information and belief, that at all the times hereinbefore mentioned, there was extant in the State of California Section 377 of the California Code of Civil Procedure, which provides as follows:

"Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions"

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party."

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22. That by reason of the foregoing death of Jasper Wallace Hall he left him surviving as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall,

an infant under the age of fourteen years, to wit, the age of five years.

23. That by reason of the foregoing the estate of Jasper Wallace Hall and the next of kin of the said Jasper Wallace Hall have been damaged in the sum of $200,000.00.

As and for a Second Cause of Action on Behalf of Plaintiff, Marjory M. Hall:

24. That on and for some time prior to March 20, 1953, Jasper Wallace Hall and Marjory M. Hall were husband and wife, living together as such, with their domicile and residence in the State of South Carolina.

25. Jurisdiction hereunder is based upon diversity of citizenship and amount. Plaintiff Marjory M. Hall is a citizen and resident of the State of South Carolina.

26. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "3" to "21", both inclusive of this complaint, with the same force and effect as though more fully set forth herein at length.

27. That by reason of the foregoing death of Jasper Wallace Hall, caused as aforesaid, he left him surviving as a lawful heir, his wife, Marjory M. Hall.

28. That the aforesaid death of Jasper Wallace Hall, caused as aforesaid, occurred without any fault or lack of care on the part of plaintiff Marjory M. Hall, contributing thereto in any manner whatsoever.

29. That as the result of the death of Jasper Wallace Hall, caused as aforesaid, the said Marjory M. Hall was caused to suffer the loss of his society and companionship,

his love and affection, and his services and support, all to her damage in the sum of $200,000.00.

Complaint

For a Third Cause of Action on Behalf of the Infant Plaintiff Judith Marie Hall, by Her Guardian Ad Litem Marjory M. Hall:

30. That heretofore and prior to the commencement of the action, this Court duly appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall, an infant under the age of 14 years, to wit, the age of five years, for the purpose of commencing and maintaining the within action.

31. That on March 20, 1953, and at all times prior to the death of Jasper Wallace Hall, as hereinbefore and hereinafter alleged, the infant Judith Marie Hall was the daughter of said Jasper Wallace Hall, living with and being supported and provided for by said Jasper Wallace Hall.

32. That jurisdiction hereunder is based upon diversity of citizenship, and amount, the guardian ad litem Marjory M. Hall and the infant Judith Marie Hall both being residents of the State of South Carolina.

33. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "3" through "21", both inclusive of this complaint with the same force and effect as though more fully set forth herein at length.

34. That by reason of the foregoing death of Jasper Wallace Hall, caused as aforesaid, he left him surviving as a lawful heir, his daughter, Judith Marie Hall.

35. That the aforesaid death of Jasper Wallace Hall, caused as aforesaid, occurred without any fault or lack of care on the part of plaintiff Judith Marie Hall, contributing thereto in any manner whatsoever.

36. That as the result of the death of Jasper Wallace

Hall, caused as aforesaid, the said infant Judith Marie Hall,

was caused to suffer the loss of his society and companionship, his love and affection, and his support of said infant, all to her damage in the sum of $200,000.00.

For a Fourth Cause of Action on Behalf of Plaintiff Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased:

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through "18", both inclusive of this complaint, with the same force and effect as though more fully set forth herein at length.

38. Upon information and belief that heretofore and on or before March 20, 1953, the defendant, by an authorized officer or agent thereof, entered into an agreement with the United States Government, or an authorized agency thereof, for a good and valuable consideration, for the transportation by air of various persons including plaintiff's intestate, Jasper Wallace Hall, from a point in the State of New Mexico to a point in the State of California.

39. Upon information and belief that on or about March 20, 1953, and pursuant to and by direction of the orders and directives of the United States Government, the plaintiff's intestate, Jasper Wallace Hall, entered the aforesaid airplane provided by defendant for the aforesaid purpose, and became a passenger lawfully thereon.

40. That one of the conditions of the aforesaid agreement was that the defendant would provide safe passage for the persons on board said airplane, including plaintiff's intestate Jasper Wallace Hall.

41. That plaintiff's intestate was one of the intended beneficiaries of the conditions and benefits of said agreement.

42. That by reason of the foregoing the defendant breached its aforesaid agreement to provide safe passage to plaintiff's intestate, Jasper Wallace Hall.

43. That the plaintiff's intestate Jasper Wallace Hall and the United States Government performed all the terms and conditions of the aforesaid agreement on their part to be performed.

44. That by reason of the foregoing the estate of Jasper Wallace Hall and the next of kin of the said Jasper Wallace Hall all have been damaged in the sum of $200,000.00.

WHEREFORE, the plaintiff Robert F. Nolan demands judgment against the defendant on the first cause of action in the sum of $200,000.00 and on the fourth cause of action in the sum of $200,000.00; the plaintiff Marjory M. Hall demands judgment against the defendant on the second cause of action in the sum of $200,000.00; and the infant plaintiff Judith Marie Hall demands judgment against the defendant on the third cause of action in the sum of $200,000.00, together with the costs and disbursements of each cause of action.

SPEISER & O'BRIEN

By EDWARD O'BRIEN
Member of the firm
Attorneys for Plaintiffs
Office & P. O. Address
501 Fifth Avenue
New York 17, N. Y.

Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Transocean Air Lines, by its attorneys, Haight, Gardner, Poor & Havens, answering the complaint herein:

As to the First Alleged Cause of Action:

I. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 1, 2, 5, 15, 20, and 22 of the complaint herein.

II. Upon information and belief denies each and every allegation contained in paragraphs 10, 11, and 12 of the complaint except that it admits and alleges that at all the times hereinafter mentioned, the defendant, in the conduct of its said business, operated, maintained and controlled the said airplane subject to the rules, regulations and directions of the Civil Aeronautics Administration, the Civil Aeronautics Board and other governmental agencies having jurisdiction over air carriers.

III. Upon information and belief denies each and every allegation contained in paragraph 16 of the complaint except that it admits that at all times hereinafter mentioned and while Jasper Wallace Hall was being transported

and conveyed in said airplane, the said airplane was then being leased, operated, maintained and controlled by the defendant, subject to the rules, regulations and directions of the Civil Aeronautics Administration, the Civil Aeronautics Board and other governmental agencies having jurisdiction over air carriers, through its agents, servants and employees and that such agents, servants and employees of the defendant were operating the said airplane in and about the discharge of their duties as such agents, servants and employees within the scope of their employment and authority as such.

IV. Upon information and belief denies each and every allegation contained in paragraph 17 of the complaint except that it admits that while the said Jasper Wallace Hall was a passenger on said airplane, the said airplane was involved in an accident on March 20, 1953, in the vicinity of Alvarado, California.

V. Upon information and belief denies each and every allegation contained in paragraphs 8, 19, and 23 of the complaint.

As to the Second Alleged Cause of Action:

VI. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 24, 25, and 27 of the complaint.

VII. Answering the allegations of paragraph 26 of the complaint, defendant repeats and realleges its admissions and denials to paragraphs "3" to "21" of the complaint with

the same force and effect as though they were set forth herein at length.

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VIII. Upon information and belief denies each and every allegation contained in paragraph 29 of the complaint.

As to the Third Alleged Cause of Action:

IX. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 30, 31, 32, 34, and 35 of the complaint.

X. Answering the allegations of paragraph 33 of the complaint, defendant repeats and realleges its admissions and denials to paragraphs 3 to 31 of the complaint with the same force and effect as though they were set forth herein at length.

XI. Upon information and belief denies each and every allegation contained in paragraph 36 of the complaint herein.

As to the Fourth Alleged Cause of Action:

XII. Answering the allegations of paragraph 37 of the complaint defendant repeats and realleges its admissions and denials to paragraphs 1 through 18 of the complaint with the same force and effect as though they were set forth herein at length.

XIII. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 38, 39, 41, and 43 of the complaint herein, except

that it admits that defendant, pursuant to an agreement with the United States Government, agreed to provide passage for certain persons, designated by the United States Government, from New Mexico to California.

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XIV. Upon information and belief denies each and every allegation contained in paragraph 40 of the complaint except that it admits that defendant, pursuant to an agreement with the United States Government, agreed to provide passage for certain persons designated by the United States Government on board the said airplane.

XV. Upon information and belief denies each and every allegation contained in paragraphs 42 and 44 of the complaint herein.

First Separate Defense to All Causes of Action in the Complaint:

XVI. The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Separate Defense to All Causes of Action in the Complaint:

XVII. The right of action set forth in the complaint arose in the State of California and accrued more than one year prior to the commencement of this action. This action is, therefore, barred by the California statute of limitations.

Answer

Third Separate Defense to All Causes of Action in the Complaint:

XVIII. Neither the decedent, nor decedent's next of kin, nor the defendant, was at the time of the commencement of this action domiciled within the State of New York or the Southern District of New York; none of the matters in connection with which this action is alleged to have arisen took place within the State of New York, or within the territorial jurisdiction of the Southern District of New

York. Transocean Air Lines, therefore, objects to the maintenance of this action against it within the Southern District of New York and requests the court to decline jurisdiction of this action.

WHEREFORE, defendant, Transocean Air Lines demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS

By WILLIAM J. JUNKERMAN

A Member of the Firm

Attorneys for the Defendant

80 Broad Street

New York 4, N. Y.

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Notice of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 139-342

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of William J. Junkerman, Esq., sworn to the 6th day of February, 1959, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a stated term for the hearing of motions to be held at Room 506 of the United States Court House, Foley Square, New York, New York, on the 24th day of February, 1959, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendant and against the plaintiffs upon the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law for the reason that this action is barred by the California Statute of Limitations, and for such other and further relief as to the Court may seem just and proper.

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PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, must be served 5 days before the return date of this motion.

Notice of Motion

Dated: New York, New York
February 6, 1959.

HAIGHT, GARDNER, POOR & HAVENS
By WILLIAM J. JUNKERMAN
A member of the firm
Attorneys for Defendant
80 Broad Street
New York 4, N. Y.

To:

SPEISER & O'BRIEN, ESQS.
Attorneys for Plaintiffs
501 Fifth Avenue
New York 17, N. Y.

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Affidavit of William J. Junkerman in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 139-342

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for the defendant in the above-entitled action. I make this affidavit in support of defendant's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment to the defendant and against plaintiffs upon the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law for the reason that this action is time barred by the applicable statute of limitations.

This is an action to recover damages for the alleged wrongful death of Jasper Wallace Hall, who died in an airplane accident in the vicinity of Alvarado, in the State of California, on March 20, 1953. The compiaint was filed in this court on November 7, 1958.

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The complaint sets forth four alleged causes of action. The first cause of action is brought on behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace

Hall, Deceased, and alleges that the said Robert F. Nolan was issued letters of administration on the 18th day of February, 1958, that jurisdiction of the court is based on diversity of citizenship, that the decedent met his death as a result of the alleged negligent operation, management and control of a certain airplane by the defendant which resulted in an accident occurring on March 20, 1953, in the State of California, and that the decedent left him surviving as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall, an infant of the age of five years, and that by reason of defendant's negligence the estate of the decedent and the next of kin were damaged in the sum of $200,000.

The second cause of action is brought by Marjory M. Hall, individually, on her own behalf as wife and next of kin of the decedent, and repeats and realleges essentially the same allegations concerning the alleged negligence and liability of the defendant as is alleged in the first cause of action.

The third cause of action is brought by Marjory M. Hall, as Guardian ad Litem of the infant plaintiff, Judith Marie Hall. In this cause of action it is alleged that this court appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall for the purpose of maintaining this action, that on March 20, 1953, and prior thereto, the infant Judith Marie Hall was the daughter of the decedent, who was living with and being supported by him, and that as a result of the alleged wrongful death of the decedent, the infant

lost the society, companionship and support of the decedent and was damaged thereby.

The fourth cause of action is brought by the plaintiff, Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased, and alleges generally that the de-

cedent was being transported on defendant's aircraft pursuant to an agreement between the United States Government and the defendant, and that one of the conditions of the agreement was that the defendant would provide safe passage for the decedent and that the decedent was one of the intended beneficiaries of the said agreement, and that the defendant breached its agreement to provide safe passage to the decedent, as a result of which his estate and next of kin were damaged in the amount of $200,000.

Defendant's answer denies generally the material allegations of the complaint as to negligence and liability and sets forth three separate defenses. The first separate defense alleges that the complaint fails to state a claim against the defendant upon which relief can be granted. The second separate defense, which is the basis of this motion, alleges that the right of action set forth in the complaint arose in the State of California and occurred more than one year prior to the commencement of this action and is therefore barred by the applicable statute of limitations. The third separate defense is that of *forum non conveniens*, the defendant claiming that since neither the decedent nor the decedent's next of kin, nor the defendant, were domiciled within the State of New York at the time of the commencement of the action, and since none of the matters in connection with which this action is alleged to have arisen took place within the State of New York, the defendant objects to the maintenance of this action against it within the Southern District of New York.

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The filed pleadings will be submitted to the court upon the hearing of this motion.

Upon information and belief, the plaintiff Marjory M. Hall was born in Charleston, South Carolina, on November

17, 1936, and was married to decedent Jasper Wallace Hall, in the latter part of the year 1951.

All of the occupants of the airplane described in the complaint were killed immediately in the accident on March 20, 1953, and any cause of action for plaintiffs' decedent's wrongful death accrued on that date.

Section 377 of the California Code of Civil Procedure, which is the applicable wrongful death statute of the State of California, is quoted in full in paragraph 21 of plaintiffs' complaint.

Paragraph 3 of Section 340 of the California Code of Civil Procedure requires that such a wrongful death action be brought within one year. That paragraph reads as follows:

"TIME OF COMMENCING CIVIL ACTIONS".

* * * * *

"§340. [Within one year.] Within one year:

* * * * *

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositer against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl;

* * * * *"

Affidavit of William J. Junkerman in Support of Motion

Plaintiffs' action in the case at bar did not comply with the California statute since the complaint herein was not filed in this court until November 7, 1958.

WHEREFORE, deponent respectfully requests an order granting summary judgment in favor of the defendant and against the plaintiffs dismissing the complaint herein for the reason that the action is barred by the California statute of limitations.

WILLIAM J. JUNKERMAN

(Sworn to February 6, 1959.)

Affidavit of Edward M. O'Brien in Opposition to Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 139-342

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EDWARD M. O'BRIEN, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Speiser & O'Brien, attorneys for the plaintiffs herein. I make this affidavit in opposition to defendant's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment to the defendant and against the plaintiffs.

The within action is one to recover damages for the wrongful death of Jasper Wallace Hall, who was killed while riding as a passenger on defendant's aircraft. The aircraft crashed in the vicinity of Alvarado, California on March 20, 1953.

Plaintiffs commenced the action by filing their complaint with the Court on November 7, 1958. Plaintiffs' actions are brought pursuant to the wrongful death act of Califonia, (California Code of Civil Procedure, Section 377) which is set forth in paragraph 21 of plaintiffs' complaint.

The only ground stated in defendant's supporting papers for seeking summary judgment is that the within action was commenced more than one year after the expiration of the period of limitation set forth in Sec. 340(3) of the Cali-

fornia Code of Civil Procedure. Defendant quotes this paragraph and section on page four of its supporting affidavit.

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Assuming for the purpose of this argument that the defendant is correct in its assumption that this action is controlled by the California period of limitation, the defendant's motion must be denied because both the widow and daughter of the decedent were under the disability of infancy at the time of his death and at the time of the commencement of the within action.

Marjory M. Hall, the widow of the decedent, was born on November 17, 1936, in Charleston, South Carolina; a verified copy of her birth certificate is attached hereto. Judith Marie Hall, the daughter of the decedent, was born December 2, 1952, in Roswell, New Mexico. The decedent was born on March 21, 1934, in Augusta, Georgia. The decedent and his wife were married on December 26, 1951, in Berkeley, South Carolina. The decedent met his death in defendant's aircraft in California on March 20, 1953. The within action was commenced by the filing of the complaint in this Court on November 7, 1958. Deponent bases these dates on information received from the attorney representing the decedent's estate in Charleston, S. C.

It can readily be determined therefore, that Marjory M. Hall was approximately sixteen and one-half years old at the time of her husband's death; and her daughter was three months old at such time. Mrs. Hall became 21 years of age on November 17, 1957, and the within action was commenced before the date of her twenty-second birthday.

Since it is the law of the forum which determines matters of exceptions, that is, facts which toll the statute of limitations, *Van Dyke* v. *Parker*, 83 F. 2d 35 (C. A. 9th 1936);

53 C. J. S. Limitations of Actions, Sec. 27, it is necessary to examine the law of New York in order to determine whether the disability of infancy tolled the period of limitation for commencing this action.

Section 60 of the N. Y. Civil Practice Act provides:

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"§60. EXTENSION OF TIME TO COMMENCE ACTION IN CONSEQUENCE OF CERTAIN DISABILITIES. If a person entitled to maintain an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is at the time when the cause of action accrues, either:

1. Within the age of twenty-one years;

• • • • •

"... and if the time otherwise limited in this article for commencing the action is five years or more and if such time, expires before the disability ceases, or less than five years thereafter, the time otherwise limited shall be extended in consequence of such disability so as to permit the action to be commenced after the expiration of the time otherwise limited but not more than five years after the disability ceases; but if the time otherwise limited is less than five years, such time shall be extended by the period of disability; ..."

Under this section the least amount of time plaintiffs had in which to commence this was within one year after the disability of infancy ceased.

Mrs. Hall did not become 21 years of age until November 17, 1957. Under Sec. 60 she had at least until November 17, 1958, within which to commence the action. The action was commenced November 7, 1958, ten days before the shortest

possible extension period, that could conceivably be applicable to the within action, expired.

It is clear that even under a one year period of limitation the action is not barred because it was commenced within the shortest possible extension of time allowed by Section 60 after Mrs. Hall became 21 years of age.

This would be true even if the California tolling provisions could be applied instead of the *lex fori*. This is shown by a reading of Section 352 of the California Code of Civil Procedure, which provides:

"§352. Disabilities of Minority, Insanity, Imprisonment, and Marriage; Effect on Limitation Period Exception, as to Persons Under Disabilities. If a person entitled to bring an action, mentioned in Chapter 3 of this Title, be, at the time the cause of action accrued, either:

1. Within the age of majority; or

* * * * *

. . . The time of such disability is not a part of the time limited for the commencement of the action."

Even under California law the limitation period selected by the defendant as controlling would not commence to run until Mrs. Hall became 21. After reaching 21, she would then have to commence her action within one year after November 17, 1957; it was commenced on November 7, 1958.

It is readily apparent then that both the *lex fori* and the *lex loci* toll the period of limitation relied on by the defendant as controlling the within action. It is therefore respectfully submitted that under either the law of New York or the law of California, the plaintiffs had at the minimum

a period of one year in which to commence the action after the disability of infancy was removed from Mrs. Hall on November 17, 1957, by reason of her 21st birthday. Since the action was commenced within one year after the disability of infancy was removed the defendant's contention that the action is barred is groundless and its motion must be denied.

WHEREFORE, it is respectfully requested that an order be entered denying defendant's motion for summary judgment in all respects, and for such other and further relief as the Court deems proper.

EDWARD M. O'BRIEN

(Sworn to May 6, 1959.)

MARGIN RESERVED FOR BINDING
WRITE PLAINLY WITH UNFADING INK—THIS IS A PERMANENT RECORD

STANDARD CERTIFICATE OF LIVE BIRTH

Registration Dist. No. 9a
Registrar's No. 175-1743
Division of Vital Statistics—State Board of Health
State of South Carolina
Federal Security Agency
Public Health Service
Reg. No. 139

1 PLACE OF BIRTH
a County: Charleston
b City or town (If outside corporate limits, write RURAL): Charleston
c Full name of hospital or institution (If not in hospital or institution, give street address or location): 151 Wentworth St.

2 Usual Residence of Mother (Where does mother live?)
a State: S.C.
b County: Charleston
c City or town (If outside corporate limits, write RURAL): Charleston
d Street address (If rural, give location): 151 Wentworth St.

3 Child's name (Type or Print): Marjory Marie Poston
4 Sex: female
5a This birth: Single ☒ Twin ☐ Triplet ☐
5b If twin or triplet (This child born): 1st ☐ 2nd ☐ 3rd ☐
6 Date of birth (Month) (Day) (Year): Nov. 17, 1936

FATHER OF CHILD
7 Full name: Leon Poston
8 Age (at time of this birth): 29 Years
9 Birthplace (State or foreign country): Georgetown, S.C.
10a Usual occupation: Electrician Helper
10b Kind of business or industry:
11 Color or race: White

MOTHER OF CHILD
12 Full maiden name: Odell Douglas
13 Age (at time of this birth): 24 Years
14 Birthplace (State or foreign country): Charleston, S.C.
15 Children previously born to this mother: (a) Now many OTHER children are now living? 3 (b) How many OTHER ones were born but are now dead? 0 (c) How many children were born alive but other than reported in (a) and (b) (Do not include this child)? 0
16 Color or race: White

17 I have reviewed the information on this, my child's birth certificate, and find it to be correct.
(Signature of Mother)

18 I hereby certify that this child was born alive on the date stated above at 1:00 A.M.
18a Signature of attendant: J.H. Buell, M.D.
18b Address: Roper Hospital
18c Attendant at birth: M.D. ☐ Midwife ☐ Other (Specify)
18d Date signed

19 Date rec'd by Local Registrar: Dec. 3, 1936
20 Registrar's signature: Leon Banov, M.D.
21 Date on which given name added
By (Registrar)

Attest: The above is a true and legal copy of the facts contained in the original certificate filed in the records of the Charleston County Health Department, Charleston, S. C.

SEAL

JUL 18 1958
Date

Leon Banov M.D.
Local Registrar District 9A

VERIFICATION OF BIRTH

THIS IS TO CERTIFY that there is on file at the DEPARTMENT OF HEALTH, Charleston, S. C., a record of the birth of

NAME OF CHILD: Marjory Marie Poston REG. NO. 175-1743

DATE OF BIRTH: November 17, 1936 SEX: Female RACE: White

PLACE OF BIRTH: 151 Wentworth St.

MAIDEN NAME OF MOTHER: Odell Douglas

NAME OF FATHER: Leon Poston

LEON BANOV, M.D., DIRECTOR

BY Leon Banov M.D. JUL 18 1958
DIRECTOR

DEPARTMENT OF HEALTH
CHARLESTON, S. C.

FEE FOR CERTIFIED RECORD - $1.00 NO FEE FOR THIS VERIFICATION

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Reply Affidavit of William J. Junkerman in Support of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I make this affidavit in reply to plaintiffs' attorney's affidavit in opposition to defendant's motion for summary judgment.

In his affidavit, sworn to the 6th day of May, 1959, Mr. O'Brien refers to Section 60 of the New York Civil Practice Act and contends that that section would toll the running of the Statute of Limitations until November 17, 1958. However, Section 60 of the Civil Practice Act and the cases cited in Mr. O'Brien's affidavit have no application to the situation in the case at bar. This Court in *Moore, et al.* v. *Roschen, et al.*, 93 F. Supp. 993 (U. S. D. C. S. D. N. Y.) (1950) held that Section 60 was inapplicable under an almost identical situation.

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Plaintiffs' affidavit also cites a brief part of Section 352 of the California Code of Civil Procedure to support their position. In doing so they failed to disclose that Section 25 of the California Civil Code provides that under California law a married woman reaches her majority at the age of 18 years. That section reads as follows:

Reply Affidavit of William J. Junkerman in Support of Motion

"§25. [Minors, who are: Construction of section: Married female deemed adult: Effect of subsequent judgment of annulment.] Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. Subsequent judgment of annulment of such marriage shall not deprive such female person of her adult status once attained under the foregoing provision, unless such judgment is obtained in an action commenced prior to her reaching the age of 18 years, in which latter event she shall be deemed to have remained a minor at all times notwithstanding such marriage."

(Subsequent amendments to this section in 1953 and 1955 giving a married person, 18 years of age or over, the right as an adult person to maintain or defend an action affecting his marital status, have no bearing on the question involved here.)

Reply Affidavit of William J. Junkerman in Support of Motion

The leading decisions interpreting Section 25 are set forth in defendant's memorandum of law, submitted herewith. It is respectfully submitted that they show clearly that this action was barred one year following the 18th birthday

of Marjory M. Hall. Marjory M. Hall, having been born on November 17, 1936, her 18th birthday was on November 17, 1954 and the action was barred on November 17, 1955.

WHEREFORE, deponent respectfully requests that its motion be, in all respects, granted.

WILLIAM J. JUNKERMAN

(Sworn to May 6, 1959.)

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Opinion of Levet, *D.J.*

The defendant, Transocean Air Lines, has moved for summary judgment in its favor upon the ground that it is entitled to judgment as a matter of law for the reason that the action is barred by the California Statute of Limitations.

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The action seeks recovery of damages for the allegedly wrongful death of Jasper Wallace Hall in an airplane accident in the Vicinity of Alvarado, in the State of California, on March 20, 1953. The complaint was filed in this court on November 7, 1958.

The complaint sets forth four alleged causes of action. The first cause of action is brought on behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and alleges that the said Robert F. Nolan was issued letters of administration on the 18th day of February, 1958, that jurisdiction of the court is based on diversity of citizenship, that the decedent met his death as a result of the alleged negligent operation, management and control of a certain airplane by the defendant which resulted in an accident occurring on March 20, 1953, in the State of California, and that the decedent left him surviving, as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall, an infant of the age of 5 years, and that by reason of defendant's negligence the estate of the decedent and the next of kin were damaged in the sum of $200,000.

The second cause of action is brought by Marjory M. Hall, individually, on her own behalf as wife and next of kin of the deceased, and repeats and realleges essentially the same allegations concerning the alleged negligence and liability of the defendant as is alleged in the first cause of action.

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The third cause of action is brought by Marjory M. Hall, as Guardian ad Litem of the infant-plaintiff, Judith Marie Hall. In this cause of action it is alleged that this court appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall for the purpose of maintaining this action, that on March 20, 1953, and prior thereto, the infant, Judith Marie Hall, was the daughter of the decedent, who was living with and being supported by him, and that as a result of the alleged wrongful death of the decedent the infant lost the society, companionship and support of the decedent and was damaged thereby.

The fourth cause of action is brought by Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and alleges generally that the decedent was being transported on defendant's aircraft pursuant to an agreement between the United States Government and the defendant, and that one of the conditions of the agreement was that the defendant would provide safe passage for the decedent and that the decedent was one of the intended beneficiaries of the said agreement, and that the defendant breached its agreement to provide safe passage to the decedent, as a result of which his estate and next of kin were damaged in the amount of $200,000.

The facts involved here are as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936.

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2. The decedent, Jasper Wallace Hall, was born March 2, 1934.

3. The marriage took place on December 26, 1951, in South Carolina.

4. Judith Marie Hall, the child of this couple, was born December 2, 1952.

5. The death of Jasper Wallace Hall took place on March 20, 1953.

6. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.

7. The administrator was appointed on February 18, 1958.

8. The action was commenced in this court on November 7, 1958.

9. The widow is a resident of Charleston, South Carolina.

The California Wrongful Death Statute, upon which this action is predicated, allows suit by the heirs or personal representatives of decedent. (Section 377 of the California Code of Civil Procedure). Under California law, such an action must be commenced within one year from the dece-

dent's death. Section 340, subd. 3, California Code of Civil Procedure; Marks v. Reissinger, 35 Cal. App. 44, 169 P. 243 (1917). However, the statute is tolled during the minority of the person entitled to sue. Section 352 of the California Code of Civil Procedure.

Section 25 of the California Civil Code reads in part as follows:

> "Minor are all persons under 21 years of age; • • • provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the

second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. • • • "

Defendant's argument in support of its motion may be summarized as follows:

1. The one-year California statute of limitations for the bringing of a wrongful death action is applicable here.

2. By virtue of Section 25 of the California Civil Code, Marjory M. Hall, the widow, attained her majority on November 17, 1954, her eighteenth birthday.

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3. This action became time-barred on November 17, 1955, one year after Marjory M. Hall reached her eighteenth birthday.

4. The action of the daughter, Judith Marie Hall, became barred at the same time as that of the widow.

The plaintiffs, in opposition to this motion, contend:

1. That the law of the forum, New York, determines the tolling of the statute of limitations due to infancy and that, therefore, the statute did not commence to run until November 17, 1957, when Marjory M. Hall reached the age of 21. (See New York Civil Practice Act, Section 60)

2. That even under the California statutes, the running of the statute of limitations would not commence until Mrs. Hall became 21.

3. That even if the widow's action is time-barred, the action of the daughter is not.

While the California courts have interpreted the one-year statute of limitations on wrongful death actions to be procedural rather than an inherent part of the right to recovery (see Wohlgemuth v. Meyer, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956)), the one-year California statute is clearly applicable here by reason of Section 13 of the New York Civil Practice Act, which reads in part as follows:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon *the* cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. • • • "

In applying the California statute of limitations, this court must apply all of its "accouterments," including its tolling provisions and its rules on infancy. See American Surety Company of New York v. Gainfort, 2 Cir., 1955, 219 F. 2d 111, 112; Moore v. Reschen, D. C. S. D. N. Y. 1950, 93 F. Supp. 993, 994.

In the Moore case, supra, Section 60 of the New York Civil Practice Act, tolling the running of the statute of

limitations during certain disabilities including infancy, was held to be inapplicable to an action brought in this court by a non-resident infant-plaintiff for personal injuries sustained in Pennsylvania. In granting a motion for summary judgment, the court concluded that the infant-plaintiff's cause of action was barred under the Pennsylvania statute of limitations and that Section 60 of the New York Civil Practice Act could not enlarge the time prescribed by Pennsylvania, where the cause of action arose.

Similarly, in the case at bar, if, as the defendant contends, this action would be time-barred in California, where the cause of action arose, it is time-barred in New York as well.

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The pertinent law with respect to the one-year California statute of limitations may be recapitulated as follows:

1. A woman who lawfully marries prior to the age of 18 attains her majority upon reaching that age. California Code, Section 25.

2. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority. Haro v. Southern Pac. R. Co., 17 Cal. App. 2d 594, 62 P. 2d 441 (1936); see also Caraway v. Burns, 143 Cal. App. 2d 327, 299 P. 2d 689 (1956).

3. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent. Haro v. Southern Pac. R. Co., supra; Sears v. Majors, 104 Cal. App. 60, 285 P. 321 (1930). (For similar reasons the causes of action of the administrator herein would also appear to be barred.)

It is clear from the foregoing that under California law, Marjory M. Hall attained her majority on November 17,

1954, when she became 18, and that her cause of action and that of Judith Marie Hall for the death of Jasper Wallace Hall became time-barred on November 17, 1955.

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Plaintiffs' contention that the California courts would not apply Section 25 of the California Code to time-bar an action brought by a non-resident, in my opinion, lacks merit. Such a rule might in effect prefer non-residents by permitting them to obtain recoveries in the California courts on claims which under the same circumstances would be outlawed to California residents. The case of Deason v. Jones, 7 Cal. App. 2d 482, 45 P. 2d 1025 (1935), cited by the plaintiffs, does not support their position. There, the court applied the California infancy rule to bar recovery on a contract entered into by the defendant in California even though previously, while residing in Oklahoma, he had obtained a court decree from that state declaring him to have attained majority for the purpose of transacting business.

Since this action is barred by the applicable statute of limitations, the defendant's motion for summary judgment must be granted.

So ordered.

Dated: New York, N. Y.
May 14, 1959.

RICHARD H. LEVET
United States District Judge

Judgment entered May 14, 1959.

HERBERT A. CHARLSON,
Clerk.

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 139-342

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that Robert F. Nolan, Administrator of the Estate of Jasper Wallace Hall, deceased, Marjory M. Hall individually, and Marjory M. Hall as Guardian ad Litem of Judith Marie Hall, an infant, hereby appeal to the United States Court of Appeals for the Second Circuit, from an Order of Honorable Richard H. Levet, United States District Judge for the Southern District of New York, dated May 14, 1959, granting summary judgment to the defendant Transocean Air Lines and dismissing the Complaint in this action.

Dated: New York, N. Y.
June 11, 1959

SPEISER, QUINN & O'BRIEN
Attorneys for Plaintiffs-Appellants
By EDWARD M. O'BRIEN
Office & P. O. Address
290 Madison Avenue
New York 17, N. Y.

Notice of Appeal

To:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
80 Broad Street
New York, N. Y.

Clerk, United States District Court
Southern District of New York
United States Court House
Foley Square
New York 17, N. Y.

[fol. 42]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1959

Argued January 5, 1960

Docket No. 25779

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Before: Lumbard, Chief Judge, Moore and Friendly, Circuit Judges.

Appeal from judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, 173 F. Supp. 114, granting defendant's motion for summary judgment based on the statute of limitations. Affirmed.

Robert A. Dwyer, New York, N. Y. (Stuart M. Speiser and Speiser, Quinn & O'Brien, New York, N. Y. on the brief), for Appellants.

[fol. 43] William J. Junkerman, New York, N. Y. (Maurice L. Noyer and Haight, Gardner, Poor & Havens, New York, N. Y. on the brief), for Defendant-Appellee.

OPINION—March 2, 1960

Friendly, Circuit Judge:

Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think

the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.

The action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow appointed by the District Court as guardian *ad litem* of her minor child. The administrator alleged two causes of action; the widow alleged one on her own behalf and another as guardian *ad litem*. The jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York and the widow and infant residents of South Carolina and the defendant a corporation organized and maintaining its principal place of business in California. The administrator, although appointed in another state, was a proper party plaintiff, Fed. R. Civ. Proc. 17 (b); N. Y. Decedent Estate Law §160.

Defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of [fol. 44] the California period of limitations by the "borrowing" provision of the New York statute of limitations, New York Civil Practice Act, §13. Judge Levet granted the motion (173 F. Supp. 114), and plaintiffs appeal from the judgment of dismissal. We affirm.

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

The causes of action here asserted arose in California, by virtue of Section 377 of the Code of Civil Procedure of that state, providing that when the death of a person "is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Paragraph 3 of §340 of the Code of Civil Procedure requires that numerous categories of actions, including actions for wrongful death, be brought within one year.[1] Section 352 [fol. 45] of the Code of Civil Procedure provides that if a person entitled to bring an action be a minor when the cause of action accrued, "The time of such disability is not a part of the time limited for the commencement of the action."

California's provisions as to what constitutes minority are found in §25 of its Civil Code. This reads in part as follows:

> "Minors are all person under 21 years of age; * * * provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an

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[1] The District Judge held and the parties do not dispute that §340(3) of the California Code of Civil Procedure is a true statute of limitations going only to the remedy, rather than, as is more often the case with death statutes, American Law Institute, Restatement of Conflict of Laws §397, a substantive provision affecting the right. Such authority as exists supports this. See *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113 (C. C. D. Ore. 1907); *cf. Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940 (9th Cir. 1950); *Wohlgemuth* v. *Meyer*, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956). This result would also follow under the test of "specificity" adopted in *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152 (2d Cir. 1955).

> action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. * * * "

In contrast, under the law of South Carolina, where the Halls resided, all persons remain minors until they attain the age of 21. South Carolina Code, Volume 1, §10-104 (1).

The death occurred on March 20, 1953. Mrs. Hall, who had been married in South Carolina shortly after becoming 15, reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957. The action was begun on November 7, 1958.

(1) Despite the New York residence of the administrator, appellants argued the case, both in the District [fol. 46] Court and before us, on the assumption that it fell within the general rule of §13 of the New York Civil Practice Act and not within the exception "that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply."[2] Nevertheless, because of the serious consequences of affirmance, we have considered whether the case comes within the exception, in which event the administrator might prevail unless the California rule, stated below in our discussion of the child's cause of action, is a part of the cause of action rather than of California's statute of limitations. We conclude it does not. While we have found no authority on the point, we do not believe the courts of New York would permit the policy embodied in §13 of the Civil Practice Act against opening the courts of that state to suits by non-residents on foreign causes of action that were time-barred in the state creating them, to be overcome by the appointment of a resident of New York as administrator

[2] We have held that "the time limited by the laws of" New York for a foreign wrongful death, where the limitation of the foreign state is procedural and not substantive, is the six years provided by C. P. A. §48(2) for actions on a statute. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (2d Cir. 1949).

of a non-resident's estate.[3] Since the administrator is thus subject to the California statute of limitations as the widow and child clearly are, his cause of action would seem barred by the rule referred to, even if California would compute [fol. 47] the one year for his bringing suit as running only from his appointment rather than from Hall's death.

(2) We turn therefore to the cause of action asserted by the widow.

In applying §13 of the Civil Practice Act, the New York courts would take into account not only the one-year limitation of California applicable to actions for wrongful death but "all its accouterments" including the provision tolling the statute during minority. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (2d Cir. 1955). The disputed question is how the New York courts would think the California courts would determine the duration of Mrs. Hall's minority. Defendant contends and the District Court held that California would apply Section 25 of its Civil Code despite Mrs. Hall's South Carolina residence and that accordingly her time to bring the action in California ceased on November 17, 1955, when she became 19.[4] Appellants assert the California conflict of laws rule would require the California courts to look to the law of South

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[3] In holding this we have not overlooked the rule, established in *Chappedelaine* v. *Dechenaux*, 8 U. S. (4 Cranch) 306, 308 (1808), "that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship." *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183, 186 (1931).

[4] We note in passing that §25 of the California Civil Code makes the attaining of adulthood by a female at 18 dependent upon her having contracted "a lawful marriage." Mrs. Hall was 15 and her husband 17 at the date of their marriage in South Carolina. However, South Carolina, to whose law California would look to determine the validity of the marriage, follows the common law rule permitting males to marry at 14 and females at 12; the ages for licensed marriages with parental consent are 18 for males and 14 for females but absence of a license does not render the marriage illegal. *State* v. *Ward*, 204 S. C. 210, 28 S. E. 2d 785 (1944).

Carolina, where Mrs. Hall had always resided, to ascertain the duration of her minority.

The parties have cited no authorities determinative of this question and we have found none. Appellants rely on *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 Pac. 2d [fol. 48] 218 (1955). In *Deason* v. *Jones*, the defendant, originally domiciled in Oklahoma, had obtained a decree in that state authorizing him to transact business with the same effect as if he had attained majority. He subsequently came to California and, before attaining 21, entered into a contract that he then sought to disaffirm. The Court held he might do so despite the Oklahoma decree. Appellants rely on a statement that "the status of all persons within a state is exclusively a matter for that state to determine for itself." However, the Court followed this by saying that "in the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to the contract which was made in this state, and the respondent had acquired no status which exempted him therefrom." Since the Court gave effect to the California statute on minority, even as to one who had previously acquired majority for contracting purposes under the law of his domicile, the case seems more favorable to appellee than to appellants. In *Emery* v. *Emery*, Mrs. Emery and two daughters, residents of California, sued Mr. Emery in that state for injuries they had suffered in Idaho in a car driven by the Emery son. The Court held "that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile" and consequently applied California law. While this is apparently a departure from the rule followed in most states, and one urged by eminent authors, Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 974-75 (1952), it has little bearing on what law California would choose to determine the ending of minority for the purpose of bringing suit in its courts. The provision in Fed. R. Civ. Proc. 17 (b) that "The [fol. 49] capacity of an individual, other than one acting in

a representative capacity, to sue or be sued shall be determined by the law of his domicile," also relied on by appellants, likewise does not assist in determining to what law the California courts would look in deciding when Mrs. Hall first became entitled to sue in California in her own right.

Despite general statements that matters of status are regulated by the law of the domicile, the courts seem rather to determine capacity to act by applying the law of the state deemed to have the most significant connection with the act.[5] Thus capacity to transfer title to property is governed by the law of the *situs*, and this whether the property be real or personal. American Law Institute, Restatement of the Conflict of Laws, §§216, 255.[5] The much discussed case of *Milliken* v. *Pratt*, 125 Mass. 374 (1878), held the capacity of a married woman to contract was to be determined by the law of Maine where the contract was made rather than by the law of Massachusetts where she was domiciled. This rule was adopted in the Restatement, §333.[6] Indeed, the Restatement applies the law of the place of making to determine capacity to enter into the most "status" forming of all contracts—marriage, §121 (e) 5 and illustration 3, although Dean Griswold thinks this may be only a short-hand way of subsuming a reference to the "whole law" [fol. 50] of the domicile including its conflict of laws and a further reference by the law of the domicile in most cases to the law of the place of contracting. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1199 (1938). See *In re May's Estate*, 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Inherent in the conflict of laws rules just reviewed is a desire that all acts with consequences in a state shall have the same consequences regardless of the identity of the actors. This policy would seem peculiarly applicable to

---

[5] Restatement of the Conflict of Laws Second, Tentative Draft No. 5, is still to this effect, although the comments (§216 and §254a) have been altered so that the reference to the law of the *situs* includes its conflict of laws.

[6] A perceptive critic, who regards the rule of the Restatement as an oversimplification, agrees that "a return to the rule, rejected by Mr. Justice Gray, that the contractual capacity of a person is governed by the law of the domicile, is not a satisfactory solution." Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. Chi. L. Rev. 227, 248 (1958).

a determination of majority incident to the application of a statute of limitations, a matter that has long been recognized as one for the forum. The question here, like so many conflicts questions today, is one of statutory construction—did the California legislature intend §25 of the Civil Code to apply only to Californians or to persons acting with respect to California whether Californians or not? We think the latter, at least so far as concerns the age at which a person is deemed sufficiently mature to control litigation in California courts. When the California legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same—just as it would scarcely have wished to permit a South Carolina bride of 14 to sue in California's courts in her own name if South Carolina should have thought its females as precocious for suing as for marrying. This is preeminently a case where California would desire to apply to all suitors the law "of the forum, with which the lawyers and judges are more familiar and which can be administered more conveniently," *Bournias* v. *Atlantic Maritime Co., supra,* at 154.

Appellants argue that, under this holding, §13 of the Civil Practice Act abridges Mrs. Hall's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, *McKenett* v. [fol. 51] *St. Louis-San Francisco Ry.*, 292 U. S. 230 (1934). Recognizing that *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920) forecloses constitutional attack on §13 on the general basis that the statute limits non-residents to a shorter period than residents for bringing suit, they say that, in contrast to the complainant in the *Canadian Northern* case, Mrs. Hall never had an opportunity to sue in New York, because §236 of the Civil Practice Act prevented her from suing in her own name until she became 21 and by that time §13, as the District Judge applied it, had closed the doors. However, Mrs. Hall could have maintained an action in New York at any time by a guardian *ad litem*. Civil Practice Act §§201-06. and §201 states expressly that the rights of an infant to maintain an action "shall not be deferred or delayed on account of his infancy." It is of

no moment from a constitutional standpoint that a New York widow of the same age would have had the added privilege of awaiting majority and bringing suit in her own name within the period provided by C. P. A. §60. For, as said in *Canadian Northern Ry.* v. *Eggen*, *supra*, at 562, the constitutional requirement is satisfied "if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

(3) We come finally to the cause of action asserted on behalf of the minor daughter. If this stood alone, neither the California nor the New York statute of limitations would be an obstacle, since both were tolled by infancy. The barrier lies in another California rule, namely the holding that §377 of its Code of Civil Procedure creates a single joint cause of action for wrongful death and that if limitation has barred the action as to an adult parent, [fol. 52] the action is also barred as to a minor infant, *Sears* v. *Major*, 104 Cal. App. 60, 285 P. 321 (1930); *Haro* v. *Southern Pacific R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441 (1936). Appellants claim these cases to be inconsistent in theory with more recent decisions, *Secrest* v. *Pacific Electric Ry.*, 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); *Flores* v. *Brown*, 39 Cal. App. 2d 622, 248 P. 2d 922 (1952) and *Perkins* v. *Robertson*, 140 Cal. App. 2d 536, 295 P. 2d 972 (1956), that a bar against recovery by one heir because of contributory negligence does not preclude recovery by others. It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities.

Judgment affirmed.

[fol. 53]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

JUDGMENT—March 2, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 54] [File endorsement omitted]

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 963, October Term, 1959

ROBERT F. NOLAN, Administrator, et al., Petitioners,

vs.

TRANSOCEAN AIR LINES.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

ILE COPY

Office-Supreme Court, U.S.
FILED
MAY 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

..... TERM, 1960

No. ~~963~~ 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

..... TERM, 1960

No. .....

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and Marjory M. Hall, individually and as Guardian *ad Litem* of Judith Marie Hall, an infant, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals, entered herein March 2, 1960, affirming the judgment of the United States District Court for the Southern District of New York granting defendant's motion for summary judgment based on the statute of limitations.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Opinions Below

The opinion of the District Court granting summary judgment is reported in 173 F. Supp. 114. The opinion of the Court of Appeals affirming the judgment of the District Court is not officially reported as yet.

Statement

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as Guardian *ad Litem* of her minor child. Jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York, the widow and her minor child being residents of South Carolina and the defendant being a California Corporation. The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, §377.

The defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of the California period of limitations by the "borrowing" provision of the New York statute of limitations. The District Court granted the motion. Upon appeal, the Court of Appeals unanimously affirmed.

The Pertinent Facts

The undisputed facts in this case may be summarized as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936.
2. The marriage of decedent to the widow took place on December 26, 1951.
3. Judith Marie Hall, the child of the couple, was born December 2, 1952.
4. The death of decedent took place on March 20, 1953.
5. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.
6. The administrator was appointed on February 18, 1958.
7. The action was commenced in the District Court on November 7, 1958.
8. The widow was and is a resident of South Carolina.
9. The administrator was and is a resident of New York.
10. The defendant was and is a California corporation.

The Questions Involved

Question 1

Does the provision in Rule 17(b) of the Federal Rules of Civil Procedure that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile" re-

quire the Federal District Court sitting in New York to apply the law of the widow's domicile herein in determining the age of majority of the widow for purposes of tolling the statute of limitations of California as incorporated by the laws of New York?

Question 2

Should not the Court of Appeals and the District Court have refused to follow two old decisions of the California Court holding that if the widow is barred from bringing a wrongful death action by reason of the statute of limitations then the infant child is also barred, since the action is deemed joint, where three recent decisions of the same Court have permitted the remaining heirs to bring the action although one of the heirs is barred by reason of contributory negligence, on the ground that the action is joint only in the sense that there cannot be a series of suits by each heir?

Question 3

Does not the construction of Section 13 of the New York Civil Practice Act by the District Court and Court of Appeals herein abridge the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, since, as so construed, the widow, because of her nonresidence, has been given no access to the courts of New York in her own name, whereas a resident of New York under similar circumstances would have had such access?

Statutes Involved

Section 377 of the California Code of Civil Procedure provides in pertinent part, as follows:

> "When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. . . . In every action under this section, such damages may be given as, under all the circumstances of the case, may be just. . . . The respective rights of the heirs in any award shall be determined by the court. . . ."

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. . . ."

Subdivision 3 of Section 340 of the California Code of Civil Procedure provides in pertinent part:

> "TIME OF COMMENCING CIVIL ACTIONS"
>
> "§340. Within one year:
>
> • • • • •
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another. . . ."

Section 352 of the California Code of Civil Procedure provides in so far as relevant to this case:

> "If a person entitled to bring an action . . . be, at the time the cause of action accrued, either:
>
> 1. Within the age of majority; . . .
>
> —The time of such disability is not part of the time limited for the commencement of the action."

Section 25 of the California Civil Code provides in pertinent part as follows:

> "Minors are all persons under 21 years of age; . . . provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract. . . ."

Court Rule Involved

Rule 17 (b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . ."

The Opinions Below

The reasoning of the District Court may be summarized as follows:

1. The California Wrongful Death Statute, upon which this action is predicated, allows suit by the heirs or personal representatives (California Code of Civil Procedure, §377).

2. Section 13 of the New York Civil Practice Act requires the District Court to apply the California Statute of Limitations and "all its accouterments" including the provision tolling the statute during minority.

3. Under California law, a wrongful death action must be commenced within one year from decedent's death (California Code of Civil Procedure, §340(3)).

4. The statute of limitations is tolled during the minority of the person entitled to sue (California Code of Civil Procedure, §352).

5. However, a woman who lawfully marries prior to the age of 18 attains her majority upon reaching that age (California Civil Code, §25).

6. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority.

7. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent.

8. For similar reasons, the causes of action of the administrator herein would also appear to be barred.

The District Court concluded from the foregoing that under California law, which was incorporated herein by virtue of Section 13 of the New York Civil Practice Act, all the causes of action herein were time-barred on November 17, 1955, since the widow attained her majority on November 17, 1954, when she became 18 years of age.

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) Under the conflict of laws rule of both New York and California, and also under Rule 17 (b) of the Federal Rules of Civil Procedure, the District Court should have determined the minority status of the widow by the law of her domicile, South Carolina, which extends her minority to age 21; (2) That in view of recent decisions of the California Court, California would no longer bar the action on behalf of the minor infant simply because the parent was barred, and (3) That the Court's construction of Section 13 of the New York Civil Practice Act, in effect, abridged the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2 of the Federal Constitution, in that she never had an opportunity to sue in the New York Courts in her own name by reason of her non-residence.

The Court of Appeals, in affirming, held that since there was no controlling decision in point, it felt that the better rule would be to apply the law of the forum, California, not the law of the domicile, South Carolina, as to the minority status of the widow; that the widow's privileges and immunities were not abridged since she could have sued in New York by a Guardian *ad Litem;* and that in barring the infant child the District Court "was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that

are alleged to be inconsistent with but in no way reflect on the pertinent authorities."

Reasons for Granting the Writ

1. The Court below has decided an important question of Federal law which has not been, but should be, decided by this Court.

The precise issue in this case is one of first impression. The question before the court below was: What law should be applied to determine when the widow herein reached the age of majority, the law of the place of the accident as "borrowed" by the law of the forum, or the law of the widow's domicile?

It is submitted that Rule 17 (b) of the Federal Rules of Civil Procedure should be determinative of this issue. Rule 17 (b) provides in pertinent part that "The capacity of an individual . . . to sue or be sued shall be determined by the law of his domicile." One of the factors most frequently involved in this question of capacity to sue is the status of minority-majority. Thus, either by statute or decisional law it is universally held in this country that a minor does not have capacity to sue. This is premised upon the self-evident fact that a minor has not reached sufficient physical and mental capacity to be capable of intelligently prosecuting an action on his own behalf. And generally the states provide for a tolling of the statutes of limitations during this period.

It is most appropriate that the state of domicile determine when persons within that state have reached an age when they should be considered adults and therefore having a capacity to sue. Rule 17 (b) is merely a recognition of this fundamental principle. This is in accord with the generally accepted common law rule. 15 C. J. S. Conflict

of Laws, §14b, pp. 907-08; *Deason* v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025; *Emery* v. *Emery*, 45 C. 2d 421, 289 P. 2d 218; *Kinnier* v. *Kinnier*, 45 N. Y. 535; *Sun Oil Co.* v. *Guidry*, 99 So. 2d 424.

2. The Court below has decided an important question of local law in a way probably in conflict with applicable local decisions and decisions of this Court.

In 1890, the California Supreme Court held that Section 377 of the California Code of Civil Procedure gave to the heirs a single, joint, indivisible action and, therefore, all the heirs must be joined in the action. *Hartigan* v. *Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851.

However, the precise issue involved herein did not come before a California Court until 1930, in *Sears* v. *Majors*, 104 C. A. 60, 285 P. 321. In that case, the California Appellate Court, taking a very literal and mechanistic view, held that if the widow was time-barred, then the children were also barred, since it was a joint cause of action and if one could not bring the action then none could. This rationale was followed in *Haro* v. *Southern Pac. R. Co.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936). These two cases certainly represented a very harsh result arrived at by highly legalistic reasoning. Indeed, research fails to disclose any other state having a similarly worded statute where this result has been reached.

Nevertheless, if these two cases still represent the law of California today, then petitioners could not quarrel with the Court below in following them. But, it is submitted, recent decisions of the California Appellate Court clearly show that these cases no longer would be followed in California. *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956); *Flores* v. *Brown*, 248 P. 2d 922 (1952); *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747 (1943).

In *Perkins* v. *Robertson*, *supra*, the question before the court was whether, since one of the heirs was barred by reason of his contributory negligence, were not all the heirs barred. Certainly, if the earlier conception of a joint cause of action as exemplified in the *Haro* and *Sears* cases still prevailed, then the question should have been answered in the affirmative. However, the Court refused to follow this reasoning and allowed the remaining heirs to continue the action for their damage. The Court held that the action was a single, joint, indivisible action only in the sense that there could not be a series of suits by each of the heirs. Certainly, if contributory negligence, which goes to the right of action itself, does not bar the other heirs, then a time bar, which merely goes to the remedy, should not bar the other heirs. *Wohlgemuth* v. *Meyer*, 139 C. A. 2d 326, 293 P. 2d 816 (1956).

Despite this development, the Court below refused to even consider the question, stating:

> ". . . It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities."

It is respectfully submitted that this is directly in conflict with the decisions of this Court. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956); *Merideth* v. *Winter Haven*, 320 U. S. 228 (1943); *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940).

3. The Court below has decided an important question of federal constitutional law in a way probably in conflict with applicable decisions of this Court.

The Court below has applied Section 13 of the New York Civil Practice Act in such a way as to deprive the widow and infant of access to the courts of New York. Under the law of New York, Section 236 of the New York Civil Practice Act, a person under the age of twenty-one may not prosecute a civil action in the courts of New York. Under Rule 17 (b) of the Federal Rules of Civil Procedure, the widow and child did not have capacity to sue until they reached twenty-one, the age of majority in the state of their domicile. Nevertheless, the Court below has ruled that they were barred long before they reached that age.

It is well settled that the privileges and immunities clause, Article IV, §2, of the Federal Constitution requires the courts to accord to citizens of other states substantially the same right of access to its courts as it accords to citizens of its own state. *McKnett* v. *St. Louis & F. R. Co.*, 292 U. S. 230 (1934).

Although a reasonable discrimination by the courts of a state against nonresidents does not violate the privileges and immunities clause, the court must at least give the nonresident reasonable and adequate access to its court for the enforcing of any rights he may have. *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553 (1920).

In the instant case, the petitioners by reason of their nonresidence have been given no reasonable and adequate access to the courts of New York. And the mere fact that until her nineteenth birthday the widow could have brought the action through a Guardian *ad Litem* does not constitute reasonable and adequate access. Such a finding defeats the primary purpose of the tolling provisions of the statute of

limitations, to prevent injustice to infants. In fact, the result in this case eloquently illustrates this point. Here, the infants have been found to have lost their day in court even before they became aware of their rights and obtained the appointment of either a representative of the estate or a Guardian *ad Litem*.

PRAYER

For the foregoing reasons petitioners pray that this petition be granted to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that the petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

ROBERT F. NOLAN and MARJORY M. HALL,

By HARRY S. WENDER
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2026 Eye Street N.W.
Washington 6, D. C.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1959.

(Argued January 5, 1960 Decided March 2, 1960.)

Docket No. 25779

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge,* 173 F. Supp. 114, granting defendant's motion for summary judgment based on the statute of limitations. Affirmed.

ROBERT A. DWYER, New York, N. Y. (Stuart M. Speiser and Speiser, Quinn & O'Brien, New York, N. Y. on the brief), *for Appellants.*

WILLIAM J. JUNKERMAN, New York, N. Y. (Maurice L. Noyer and Haight, Gardner, Poor & Havens, New York, N. Y. on the brief), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trial of the foreign law that it has been directed to follow.

The action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow appointed by the District Court as guardian *ad litem* of her minor child. The administrator alleged two causes of action; the widow alleged one on her own behalf and another as guardian *ad litem*. The jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York and the widow and infant residents of South Carolina and the defendant a corporation organized and maintaining its principal place of business in California. The administrator, although appointed in another state, was a proper party plaintiff, Fed. R. Civ. Proc. 17 (b); N. Y. Decedent Estate Law §160.

Defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of

the California period of limitations by the "borrowing" provision of the New York statute of limitations, New York Civil Practice Act, §13. Judge Levet granted the motion (173 F. Supp. 114), and plaintiffs appeal from the judgment of dismissal. We affirm.

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

The causes of action here asserted arose in California, by virtue of Section 377 of the Code of Civil Procedure of that state, providing that when the death of a person "is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Paragraph 3 of §340 of the Code of Civil Procedure requires that numerous categories of actions, including actions for wrongful death, be brought within one year.[1] Section 352

[1] The District Judge held and the parties do not dispute that §340(3) of the California Code of Civil Procedure is a true statute of limitations going only to the remedy, rather than, as is more often the case with death statutes, American Law Institute, Restatement of Conflict of Laws §397, a substantive provision affecting the right. Such authority as exists supports this. See *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113 (C. C. D. Ore. 1907); *cf. Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940 (9th Cir. 1950); *Wohlgemuth* v. *Meyer*, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956). This result would also follow under the test of "specificity" adopted in *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152 (2d Cir. 1955).

of the Code of Civil Procedure provides that if a person entitled to bring an action be a minor when the cause of action accrued, "The time of such disability is not a part of the time limited for the commencement of the action."

California's provisions as to what constitutes minority are found in §25 of its Civil Code. This reads in part as follows:

> "Minors are all person under 21 years of age; • • • provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. • • • "

In contrast, under the law of South Carolina, where the Halls resided, all persons remain minors until they attain the age of 21. South Carolina Code, Volume 1, §10-104 (1).

The death occurred on March 20, 1953. Mrs. Hall, who had been married in South Carolina shortly after becoming 15, reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957. The action was begun on November 7, 1958.

(1) Despite the New York residence of the administrator, appellants argued the case, both in the District

Court and before us, on the assumption that it fell within the general rule of §13 of the New York Civil Practice Act and not within the exception "that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply."[2] Nevertheless, because of the serious consequences of affirmance, we have considered whether the case comes within the exception, in which event the administrator might prevail unless the California rule, stated below in our discussion of the child's cause of action, is a part of the cause of action rather than of California's statute of limitations. We conclude it does not. While we have found no authority on the point, we do not believe the courts of New York would permit the policy embodied in §13 of the Civil Practice Act against opening the courts of that state to suits by non-residents on foreign causes of action that were time-barred in the state creating them, to be overcome by the appointment of a resident of New York as administrator of a non-resident's estate.[3] Since the administrator is thus subject to the California statute of limitations as the widow and child clearly are, his cause of action would seem barred by the rule referred to, even if California would compute the one year for his

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[2] We have held that "the time limited by the laws of" New York for a foreign wrongful death, where the limitation of the foreign state is procedural and not substantive, is the six years provided by C. P. A. §48(2) for actions on a statute. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (2d Cir. 1949).

[3] In holding this we have not overlooked the rule, established in *Chappedelaine* v. *Dechenaux*, 8 U. S. (4 Cranch) 306, 308 (1808), "that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship." *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183, 186 (1931).

bringing suit as running only from his appointment rather than from Hall's death.

(2) We turn therefore to the cause of action asserted by the widow.

In applying §13 of the Civil Practice Act, the New York courts would take into account not only the one-year limitation of California applicable to actions for wrongful death but "all its accouterments" including the provision tolling the statute during minority. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (2d Cir. 1955). The disputed question is how the New York courts would think the California courts would determine the duration of Mrs. Hall's minority. Defendant contends and the District Court held that California would apply Section 25 of its Civil Code despite Mrs. Hall's South Carolina residence and that accordingly her time to bring the action in California ceased on November 17, 1955, when she became 19.[4] Appellants assert the California conflict of laws rule would require the California courts to look to the law of South Carolina, where Mrs. Hall had always resided, to ascertain the duration of her minority.

The parties have cited no authorities determinative of this question and we have found none. Appellants rely on *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 Pac. 2d

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[4] We note in passing that §25 of the California Civil Code makes the attaining of adulthood by a female at 18 dependent upon her having contracted "a lawful marriage." Mrs. Hall was 15 and her husband 17 at the date of their marriage in South Carolina. However, South Carolina, to whose law California would look to determine the validity of the marriage, follows the common law rule permitting males to marry at 14 and females at 12; the ages for licensed marriages with parental consent are 18 for males and 14 for females but absence of a license does not render the marriage illegal. *State* v. *Ward*, 204 S. C. 210, 28 S. E. 2d 785 (1944).

218 (1955). In *Deason* v. *Jones*, the defendant, originally domiciled in Oklahoma, had obtained a decree in that state authorizing him to transact business with the same effect as if he had attained majority. He subsequently came to California and, before attaining 21, entered into a contract that he then sought to disaffirm. The Court held he might do so despite the Oklahoma decree. Appellants rely on a statement that "the status of all persons within a state is exclusively a matter for that state to determine for itself." However, the Court followed this by saying that "in the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to the contract which was made in this state, and the respondent had acquired no status which exempted him therefrom." Since the Court gave effect to the California statute on minority, even as to one who had previously acquired majority for contracting purposes under the law of his domicile, the case seems more favorable to appellee than to appellants. In *Emery* v. *Emery*, Mrs. Emery and two daughters, residents of California, sued Mr. Emery in that state for injuries they had suffered in Idaho in a car driven by the Emery son. The Court held "that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile" and consequently applied California law. While this is apparently a departure from the rule followed in most states, and one urged by eminent authors, Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 974-75 (1952), it has little bearing on what law California would choose to determine the ending of minority for the purpose of bringing suit in its courts. The provision in Fed. R. Civ. Proc. 17 (b) that "The capacity of an in-

dividual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile," also relied on by appellants, likewise does not assist in determining to what law the California courts would look in deciding when Mrs. Hall first became entitled to sue in California in her own right.

Despite general statements that matters of status are regulated by the law of the domicile, the courts seem rather to determine capacity to act by applying the law of the state deemed to have the most significant connection with the act. Thus capacity to transfer title to property is governed by the law of the *situs*, and this whether the property be real or personal. American Law Institute, Restatement of the Conflict of Laws, §§216, 255.[5] The much discussed case of *Milliken* v. *Pratt*, 125 Mass. 374 (1878), held the capacity of a married woman to contract was to be determined by the law of Maine, where the contract was made rather than by the law of Massachusetts where she was domiciled. This rule was adopted in the Restatement, §333.[6] Indeed, the Restatement applies the law of the place of making to determine capacity to enter into the most "status" forming of all contracts—marriage, §121 (e) 5 and illustration 3, although Dean Griswold thinks this may be only a short-hand way of subsuming a reference to the "whole law" of the domicile including

[5] Restatement of the Conflict of Laws Second, Tentative Draft No. 5, is still to this effect, although the comments (§216 and §254a) have been altered so that the reference to the law of the *situs* includes its conflict of laws.

[6] A perceptive critic, who regards the rule of the Restatement as an oversimplification, agrees that "a return to the rule, rejected by Mr. Justice Gray, that the contractual capacity of a person is governed by the law of the domicile, is not a satisfactory solution." Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. Chi. L. Rev. 227, 248 (1958).

its conflict of laws and a further reference by the law of the domicile in most cases to the law of the place of contracting. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1199 (1938). See *In re May's Estate*, 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Inherent in the conflict of laws rules just reviewed is a desire that all acts with consequences in a state shall have the same consequences regardless of the identity of the actors. This policy would seem peculiarly applicable to a determination of majority incident to the application of a statute of limitations, a matter that has long been recognized as one for the forum. The question here, like so many conflicts questions today, is one of statutory construction—did the California legislature intend §25 of the Civil Code to apply only to Californians or to persons acting with respect to California whether Californians or not? We think the latter, at least so far as concerns the age at which a person is deemed sufficiently mature to control litigation in California courts. When the California legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same—just as it would scarcely have wished to permit a South Carolina bride of 14 to sue in California's courts in her own name if South Carolina should have thought its females as precocious for suing as for marrying. This is preeminently a case where California would desire to apply to all suitors the law "of the forum, with which the lawyers and judges are more familiar and which can be administered more conveniently," *Bournias* v. *Atlantic Maritime Co.*, *supra*, at 154.

Appellants argue that, under this holding, §13 of the Civil Practice Act abridges Mrs. Hall's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, *McKenett* v.

St. Louis-San Francisco Ry., 292 U. S. 230 (1934). Recognizing that *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920) forecloses constitutional attack on §13 on the general basis that the statute limits non-residents to a shorter period than residents for bringing suit, they say that, in contrast to the complainant in the *Canadian Northern* case, Mrs. Hall never had an opportunity to sue in New York, because §236 of the Civil Practice Act prevented her from suing in her own name until she became 21 and by that time §13, as the District Judge applied it, had closed the doors. However, Mrs. Hall could have maintained an action in New York at any time by a guardian *ad litem*, Civil Practice Act §§201-06, and §201 states expressly that the rights of an infant to maintain an action "shall not be deferred or delayed on account of his infancy." It is of no moment from a constitutional standpoint that a New York widow of the same age would have had the added privilege of awaiting majority and bringing suit in her own name within the period provided by C. P. A. §60. For, as said in *Canadian Northern Ry.* v. *Eggen, supra*, at 562, the constitutional requirement is satisfied "if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

(3) We come finally to the cause of action asserted on behalf of the minor daughter. If this stood alone, neither the California nor the New York statute of limitations would be an obstacle, since both were tolled by infancy. The barrier lies in another California rule, namely the holding that §377 of its Code of Civil Procedure creates a single joint cause of action for wrongful death and that if limitation has barred the action as to an adult parent,

the action is also barred as to a minor infant, *Sears* v. *Major*, 104 Cal. App. 60, 285 P. 321 (1930); *Haro* v. *Southern Pacific R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441 (1936). Appellants claim these cases to be inconsistent in theory with more recent decisions, *Secrest* v. *Pacific Electric Ry.*, 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); *Flores* v. *Brown*, 39 Cal. App. 2d 622, 248 P. 2d 922 (1952) and *Perkins* v. *Robertson*, 140 Cal. App. 2d 536, 295 P. 2d 972 (1956), that a bar against recovery by one heir because of contributory negligence does not preclude recovery by others. It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of March one thou[illegible]d nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants.

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~963~~ 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 963

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners, plaintiffs below, seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered March 2, 1960, affirming a judgment of the United States District Court for the Southern District of New York.

The opinion of the District Court (Honorable Richard H. Levet) granting summary judgment dismissing the complaint is reported in 173 F. Supp. 114. The opinion of the Court of Appeals affirming the

judgment of the District Court is reported in 276 F. 2d 280, and is also printed in the appendix to the petition (Pet. 15-25).

The action was brought to recover damages for the alleged wrongful death of Jasper Wallace Hall, plaintiffs' decedent, who died in an airplane accident in the vicinity of Alvarado, California, on March 20, 1953. The flight was for the purpose of transporting military personnel from New Mexico to California on a plane operated by the defendant under contract to the United States Government. The decedent's wife and child were residents of the State of South Carolina at the time of his death. Plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as guardian *ad litem* of her minor child. Jurisdiction was predicated upon diversity of citizenship. Defendant moved for summary judgment upon the ground that the action was barred by the California Statute of Limitations. The District Court granted the motion in an order and judgment which were unanimously affirmed on appeal.

ARGUMENT

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. No conflict of decisions and no important question of federal law is involved.

2. No constitutional question is involved in the application of Section 13 of the New York Civil Practice Act.

POINT I

No conflict of decisions and no important question of federal law is involved.

Since the alleged wrongful act causing decedent's death occurred in the State of California any substantive right of action which plaintiffs may have is governed by the law of that state. *Baldwin* v. *Powell*, (1945) 294 N. Y. 130.

On page 3 of the petition, under the heading "The Pertinent Facts", petitioners set forth as undisputed facts: the marriage on December 26, 1951; the death of decedent on March 20, 1953; that the widow reached the age of 18 on November 17, 1954; that the action was not commenced until November 7, 1958; that the widow was and is a resident of South Carolina; and that the defendant was and is a California corporation.

At pages 5 and 6 of the petition petitioners have quoted from the various California statutes relevant to this case. However, in quoting from the first sentence of Section 25 of the California Civil Code which specifies that a married woman reaches her majority at the age of 18 years, petitioners have omitted two important clauses. Therefore, respondent takes the liberty of setting forth the full sentence of that section of the Code as it read on March 20, 1953, as follows:

> "§ 25. Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on mar-

riage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. * * * "

Leading California cases have held that the phrase "transaction respecting property" in Section 25 includes the bringing of an action for wrongful death, and that an action by a married woman under the age of twenty-one years for wrongful death is barred if brought more than one year after the wife has reached her eighteenth birthday.

In *Haro v. The Southern Pacific Railroad Company*, (1936) 17 C. A. 2d 594, 62 P. 2d 441, the widow was over the age of eighteen years at the time of the death of her husband and under twenty-one years of age when the action was instituted. The court referred to Section 25 of the Civil Code and after citing several cases construing the words "transaction" and "property," concluded (p. 597):

"It would seem, therefore, that the phrase 'transaction respecting property' includes within its definition the bringing of an action by a widow for the wrongful death of her husband. That

being true, Mrs. Haro was under no disability that would prevent her from suing for the damages suffered from the wrongful death of her husband at any time during the year following his demise. As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Proc.) As her cause of action is barred, the causes of action of the other plaintiffs are also barred. (*Sears* v. *Majors*, *supra*)"

It is clear from the *Haro* case that a married female who has reached the age of eighteen years is considered to have reached her majority and is deemed an adult person for the purpose of instituting an action for wrongful death.

Another case squarely in point is the case of *Caraway* v. *Burns*, (1956) 143 Cal. App. 2d 327, 299 P. 2d 689. That action involved a suit for personal injuries arising out of an accident occurring on July 18, 1948. Plaintiff was married on February 10, 1951, after having reached the age of eighteen years. Her twenty-first birthday was on May 1, 1953, and the complaint was filed on April 30, 1954. The California Superior Court had granted summary judgment for the defendants on the ground that the action was barred by the California statute of limitations (Code Civ. Proc., Sec. 340, subd. 3) because plaintiff had reached her majority on February 10, 1951. On appeal, in affirming the judgment of the lower court, the California Court of Appeals said (pp. 328-329):

"The point was decided against plaintiff's contention in *Haro* v. *Southern Pac. Co.* (1936), 17 Cal. App. 2d 594 [62 P. 2d 441], a wrongful

death action by a widow, 19 years old when her husband died, instituted more than one year after his death but before she reached the age of 21. The court held that the phrase 'transaction respecting property' in Civil Code section 25 includes the bringing of an action for wrongful death, that she therefore was under no disability preventing her to bring the action at any time during the year following his death and that at the end of that year the action was barred by the statute (p. 597). The Supreme Court denied a hearing. Appellant's attacks on this decision and her contention that it has lost authority because of an amendment made in 1953 in section 25, *supra*, are without merit."

From the foregoing it is clear that the instant action was barred on November 17, 1955, one year after Marjory M. Hall reached her eighteenth birthday.

It is also the law of California that where a cause of action is barred as to an adult parent, it is also barred as to the minor infant. *Sears* v. *Majors*, (1930) 104 Cal. App. 60, 285 P. 321.

The *Sears* case involved an action for wrongful death arising out of the malpractice of a defendant physician. The infant son was fifteen years of age at the time of his father's death and nineteen years of age when the action was commenced four years after the death. Both parties agreed that at the time that the action was commenced, the mother was barred by the statute of limitations. Plaintiffs argued that the infant's action was not barred by reason of the tolling of the statute of limitations by virtue of Section 352,

subd. 1, of the Code of Civil Procedure on the ground of infancy, and then urged that if the cause of action was saved as to the infant it was also saved as to the mother. The court rejected this argument, stating at page 62:

> "In reply, the defendants assert that a single joint cause of action is given to the heirs by Section 377 of the Code of Civil Procedure, and that the language of the statute permits of no other construction. (Civ. Code, sec. 1431; Salmon v. Rathjens, 152 Cal. 290, 294 [92 Pac. 733].) Continuing, they claim that the action being barred as to all excepting the infant, that it was also barred as to him. We think the contention is well founded. True, the court has never decided the point with reference to the Code of Civil Procedure, section 377; but the decisions are so closely in point as to be determinative. * * *"

The contention, at pages 10 and 11 of the petition, that the *Sears* and *Haro* cases, *supra*, no longer would be followed in California is totally without merit. In support of their argument petitioners cite three cases, to wit: *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956); *Flores* v. *Brown*, 248 P. 2d 922 (1952); and *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747 (1943). In none of the three cases so cited by petitioners was the statute of limitations involved.

The *Perkins* case was an action brought by minor children against their stepfather to recover for the wrongful death of their mother and for injuries to the minor children sustained in an automobile accident. The Supreme Court sustained a demurrer to the amended complaint and the infant plaintiffs ap-

pealed from the judgment in favor of their stepfather. The California District Court of Appeal reversed the judgment, holding in substance that the infant plaintiffs had a right to sue their stepfather. However, it sustained the demurrer as to one of the heirs who was guilty of contributory negligence causing the accident. The court said (p. 977):

> "If one of the heirs bringing suit for wrongful death was himself guilty of contributory negligence no recovery by him is permitted, but the remaining heirs may nevertheless recover their own damages in the action. (Citing *Bowler* v. *Roos*, 213 Cal. 484, 485, 2 P. 2d 817)."

The *Perkins* case not only did not attempt to change the rule laid down in the *Sears* and *Haro* cases, *supra*, but it affirmatively concurred that the cause of action created by Section 377 of the California Code of Civil Procedure "is a joint one, a single one and an indivisible one." (p. 976.)

Flores v. *Brown*, 248 P. 2d 922, *supra*, cited by petitioners involved an automobile collision in which three people were killed and two were injured. The dead consisted of the driver, his infant son and a friend of the family. The injured were the wife of the driver and one of their children. In five actions instituted against the owner of the truck which collided with the passenger vehicle, the defendants denied negligence and pleaded contributory negligence. The trial court instructed the jury that the contributory negligence of the husband would bar recovery for his death and could also be imputed as contributory negligence of his wife to bar recovery for her injuries. The jury brought in a verdict for the defendants in the action

for the wrongful death of the husband and for the plaintiffs in various amounts in the other four actions. The trial court thereafter granted a motion for a completely new trial as to all actions, all parties, and all issues. On appeal the Supreme Court of California, *en Banc*, affirmed in part and reversed in part. There is nothing in the court's decision that is even remotely relevant to any question presented by the present petition.

Similarly, in *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747, *supra*, a wife sued the defendant for the wrongful death of her husband as a result of injuries suffered in a collision between an automobile driven by the wife in which her husband was a passenger and a bus operated by the defendant. The lower court ruled that plaintiff was estopped from prosecuting the action by an adverse judgment entered in an earlier action by plaintiff and decedent for personal injuries arising out of the same collision. The District Court of Appeal affirmed the judgment. The decision of the Appellate Court did not touch upon any question passed upon in the *Sears* and *Haro* cases nor upon any question now before this Court upon the present petition.

Petitioners argue (Pet. 9) that Rule 17(b) of the Federal Rules of Civil Procedure should be determinative of when the widow reached the age of majority. However, since this is a diversity case state law rather than federal law should be controlling. In view of this Court's decision in *Guaranty Trust Co.* v. *York*, (1945) 326 U. S. 99, it seems clear that Rule 17(b) can have no application to the issues involved in this lawsuit. In the *Guaranty Trust Co.* case, Mr.

Justice Franfurter, in delivering the majority opinion of this Court said (pp. 108, 109):

> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

And further at page 110:

> "* * * As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944) 58 Harv. L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a

> State court, a federal court ought not to afford recovery."

And further at page 112:

> "* * * The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."

The voice of California has spoken in the *Stears* and *Haro* cases and the voice of the legislature of New York State has spoken in Section 13 of the New York Civil Practice Act.

POINT II

No constitutional question is involved in the application of Section 13 of the New York Civil Practice Act.

Since this is a diversity action brought by a nonresident of New York upon a cause of action arising in California, the court below recognized (Pet. 20) that it was required, by Section 13 of the New York Civil Practice Act, to apply the one-year limitation of California applicable to actions for wrongful death together with "all its accouterments."

The application of Section 13 of the New York Civil Practice Act by the court below does not involve any question of federal constitutional law. On the contrary, the constitutionality of a substantially similar Minnesota statute was upheld by this Court in *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553 (1920). In that case, this Court stated that the "privileges and immunities" clause of the Constitution, Article IV, § 2, is satisfied "if the non-resident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." 252 U. S. 553, 562. Here, the widow could have enforced any rights she and her child may have had under California statutes in the courts of New York at any time following her husband's death and prior to her nineteenth birthday by a guardian *ad litem*, New York Civil Practice Act, Sections 201-206. Thus, for a period of more than two and one-half years from the time her cause of action accrued, the widow was given all of the rights she would have had as a resident of New York, including the right of access to the New York courts by a guardian *ad litem*.

It is respectfully submitted that this right extended to the widow to enforce her claim by a guardian *ad litem* was reasonably sufficient and adequate and that the application of Section 13 of the New York Civil Practice Act by the court below was in all respects valid.

CONCLUSION

The decisions of the District Court and the Court of Appeals were clearly correct and the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

ROBERT F. NOLAN and MARJORY M. HALL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the District Court is reported in 173 F. Supp. 114. The opinion of the Court of Appeals is reported in 276 F. 2d 280.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254. Petition for Writ of Certiorari was granted by this Court on June 27, 1960.

Constitutional Provisions, Statutes and Rules Involved

Constitution

Article IV, §2, of the Constitution of the United States of America provides:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Statutes

Section 377 of the California Code of Civil Procedure provides in pertinent part, as follows:

> When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death . . . In every action under this section, such damages may be given as, under all the circumstances of the case, may be just . . . The respective rights of the heirs in any award shall be determined by the court . . .

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply . . .

Section 340 of the California Code of Civil Procedure provides in pertinent part:

> TIME OF COMMENCING CIVIL ACTIONS
>
> §340. Within one year:
>
> * * * * *
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another . . .

Section 352 of the California Code of Civil Procedure provides insofar as relevant to this case:

> If a person entitled to bring an action . . . be, at the time the cause of action accrued, either:
>
> 1. Within the age of majority; . . .
>
> —The time of such disability is not part of the time limited for the commencement of the action.

Section 25 of the California Code provides in pertinent part as follows:

> Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or trans-

action respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age.*

Rule

Rule 17(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile . . .

Questions Presented

1. Do applicable California decisions and the provisions of Rule 17(b) of the Federal Rules of Civil Procedure require the Federal District Court sitting in New York to apply the law of the domicile of the petitioner-widow herein in determining the age at which the widow's disabilities of minority ceased for purposes of tolling the California Statute of Limitations as "borrowed" by Section 13 of the New York Civil Practice Act?

2. Should not the Court of Appeals and the District Court have refused to follow two old decisions of the California Court holding that if the widow is barred from bringing a wrongful death action by reason of the statute of limitations then the infant child is also barred, since the action is deemed joint, where recent decisions of the same Court have permitted the remaining heirs to bring the action although one of the heirs is barred by reason of

---

* As worded on March 23, 1953, the date of decedent's death. Subsequently, Section was amended so as to apply to both sexes. Petitioners do not claim that the amendment has any material bearing on the issues herein.

contributory negligence, on the ground that the action is joint only in the sense there cannot be a series of suits by each heir?

3. Does not the construction of Section 13 of the New York Civil Practice Act by the District Court and the Court of Appeals herein abridge the petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution, since, as so construed, the petitioners, because of their non-residence have been given no access to the courts of New York in their own name, whereas a resident of New York, under similar circumstances, would have had such access?

Statement of the Case

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant (App. 3-6). The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as Guardian *ad Litem* of her minor child (App. 2, 8, 9). Jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a citizen of New York, the widow and her minor child being citizens of South Carolina and the defendant being a California corporation (App. 4). The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, §377 (App. 6, 7).

The defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of the California Statute of Limitations by the "borrowing" provision of the New York Statute of Limitations, Section 13 of the New York Civil Practice Act (App.

17). The District Court granted the motion (App. 39). Upon appeal, the Court of Appeals unanimously affirmed.

The undisputed facts in this case may be summarized as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936 (App. 25)

2. The marriage of decedent to the widow took place on December 26, 1951 (App. 25).

3. Judith Marie Hall, the child of the couple, was born December 2, 1952 (App. 25).

4. The death of decedent took place on March 20, 1953 (App. 6, 25).

5. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957 (App. 25).

6. The administrator was appointed on February 18, 1958 (App. 3, 4).

7. The action was commenced in the District Court on November 7, 1958 (App. 25).

8. The widow and child were and are citizens and residents of South Carolina (App. 8, 9).

9. The administrator was and is a citizen of New York (App. 3, 4).

10. The defendant was and is a California Corporation (App. 4).

The reasoning of the District Court may be summarized as follows:

1. Section 13 of the New York Civil Practice Act requires the District Court to apply the California Statute of Limitations and "all its accouterments" including the provisions tolling the statute during minority.

2. Under California law, a wrongful death action must be commenced within one year from decedent's death (California Code of Civil Procedure, §340(3)).

3. The Statute of Limitations is tolled during the minority of the person entitled to sue (California Code of Civil Procedure, §352).

4. However, a woman who lawfully marries prior to the age of 18, attains her majority upon reaching that age (California Civil Code, §25).

5. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority.

6. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent.

7. For similar reasons, the causes of action of the administrator herein would also appear to be barred.

The District Court concluded from the foregoing that under California law, which was incorporation herein by virtue of Section 13 of the New York Civil Practice Act, all the causes of action herein were time-barred on November 17, 1955, since the widow attained her majority on November 17, 1954, when she became 18 years of age.

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) Under the conflict of laws rule of

both New York and California, and also under Rule 17(b) of the Federal Rules of Civil Procedure, the District Court should have determined the minority status of the widow by the law of her domicile, South Carolina, which extends her minority to age 21; (2) that in view of recent decisions of the California Court, California would no longer bar the action on behalf of the infant daughter simply because the widowed mother was barred, and (3) that the Court's construction of Section 13 of the New York Civil Practice Act, in effect, abridged the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, in that she never had an opportunity to sue in the New York Courts in her own name by reason of her nonresidence.

The Court of Appeals, in affirming, held that since there was no controlling decision in point, it felt that the better rule would be to apply the law of the borrowed forum, California, not the law of the domicile, South Carolina, as to the minority status of the widow; that the widow's privileges and immunities were not abridged, since she could have sued in New York by a Guardian *ad Litem;* and that in barring the infant child the District Court "was surely right in thinking the New York Courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with, but in no way reflect on the pertinent authorities."

Summary of Argument

I. The Court below should have applied the law of the petitioner-widow's domicile in determining the termination of her minority status and the commencement of her capacity to sue. The Court below erred in applying the law of the borrowed forum, California, since local California

decisions indicate that California courts would have applied the *lex loci domicilii* under the circumstances of this case. Furthermore, even assuming as the Court below did, that there were no helpful decisions in California on this question, the Court below erred in refusing to give effect to Rule 17(b) and in applying a conflicting rule.

II. The Court below erred in blindly following two old decisions in California to bar the petitioner-daughter, when more recent decisions clearly show that these cases would not be followed today.

III. The Court below in construing Section 13, so as to bar the petitioner-infants before they attained capacity to sue in either the Federal or State Courts of New York, has deprived petitioners of their privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution.

ARGUMENT

The Court below, in holding that petitioners would be barred from bringing this action in the Courts of California, decided this question in a way that is in conflict with local California decisions and Rule 17(b) of the Rules of Civil Procedure.

Since the jurisdiction of the District Court is based upon diversity of citizenship, it must apply the "substantive" law of New York, including its conflict of laws, and its statute of limitations. *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 62 (1938); *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945).

In this case, since the action arose in California and is brought on behalf of nonresidents of New York, the applicable conflicts rule with respect to the statute of limitations is contained in Section 13 of the New York Civil Practice Act, a so-called "borrowing statute". Section 13 provides in pertinent part that an action on behalf of a nonresident cannot be brought in a court of New York "... after the expiration of the time limited by the laws either of this state or of the state or county where the cause of action arose."

It is well-settled in New York that in determining the "expiration of the time limited by the laws ... of the state ... where the cause of action arose", the New York Court will look to the whole law of the other state and not just its statute of limitations. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (C. A. 2d 1955); *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 560; *Isenberg* v. *Rainier*, 70 Misc. 498, 127 N. Y. S. 411, aff'd 145 App. Div. 256. And see *1943, Report N. Y. Law Revision Commission*, 134, 149-153. This construction appears to be in accord with the majority of states having similar statutes. Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 Rocky Mt. L. Rev. 287, 307-310. As summarized by Mr. Justice Shientag, in *Anglo Calif. Nat. Bank of San Francisco* v. *Klein*, 162 Misc. 898, 906, 296 N. Y. Supp. 191, 196 (1936), "The purpose of Section 13 is to provide that no one can be sued in New York by a nonresident, if at the time he could not be sued in the State where the cause of action arose ..."[1]

[1] See, *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921) (application of Maryland absence provision); *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917) (application of Missouri extension provision in consequence of death); *Anglo-California Nat. Bank* v. *Klein*, *supra* (application of California law to effectuate waiver of statute of limitations, although invalid in New York).

Thus, in the instant case, the Federal Court was presented with this basic question: Would petitioners have been held barred by a California Court if petitioner had brought suit there instead of here? And the determination of that question is dependent upon whether California would apply its own law or would apply the law of petitioner's domicile to determine the age at which she was no longer under a disability to sue for purposes of the California tolling provisions.

A. The Court Below Is in Error in Deciding That a California Court Would Not Look to the Law of Petitioners' Domicile to Determine the Age at Which Petitioner Was No Longer Under a Disability to Sue.

The California tolling provision (C. C. P. §352) provides that if a person be "within the age of majority . . . the time of such disability is not a part of the time limited for the commencement of the action." Petitioners urged to the Court below that in determining the period of "such disability" the law of the widow's domicile, not the law of California, would be looked to by the California Courts under their own choice of law rule and cited two cases in support, *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 P. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955). However, the Court below chose to ignore the clear implications of these cases and, in effect, applied the rule of *lex loci actus*,[2] although petitioners had no contacts with California and the only connecting link was the entirely fortuitous and irrelevant fact that the aircraft in which deceased was riding happened to crash on California soil.

[2] The opinion of the Court below is not entirely clear on this point. The Court also appears to apply the so-called "gravity" test, the law of the forum, and, by analogy, the law of the *situs*.

In *Emery v. Emery, supra,* the California Supreme Court had before it a choice of law problem in which it expressly applied the law of the domicile to determine a question of disabilities or capacity to sue. In that case, Mrs. Emery and her two daughters, residents of California, sued Mr. Emery and his son in California for injuries they had suffered in Idaho in a car driven by the Emery son. Concededly, the substantive law of Idaho applied. Under Idaho law, the father and brother were immune from liability, but under California law they were not. Thus, there was presented to the California Supreme Court the basic question, should the law of the domicile or the law of the place of injury be applied to determine the question of capacity to sue and be sued? In choosing the law of the domicile, Mr. Justice Traynor, speaking for a unanimous court, left no doubt as to the rule California elected to follow (at pp. 427, 428):

"... This choice of law problem is one of first impression in this state. The possible choices in cases like the present one are three: The law of the place where the injury occurred, the law of the forum, and the law of the state in which the family is domiciled. We are aware of only two reported cases on the precise question presented. In *Ball* v. *Ball,* ——Wyo. —— [269 P. 2d 302, 304], the Supreme Court of Wyoming applied the law of the place (Montana) where the injury occurred to determine this question. *It is not, however, a question of tort but one of capacity to sue and be sued and as to that question the place of injury is both fortuitous and irrelevant.* In *Fowlkes* v. *Ray-O-Vac,* 52 Ga. App. 338, 340 [183 S. E. 210], the Court of Appeals of Georgia held that in actions between a minor child and its parents the 'law of the forum governs as to the parties and the right to sue.' In a somewhat analogous situation, many courts have held in

tort actions between husbands and wives that questions of capacity to sue and be sued should be governed by the law of the forum. (See Ford, Interspousal Liability for Automobile Accidents in the Conflict of Laws, 15 U. Pitt. L. Rev. 397, 419, and cases cited.) It should be noted, however, that in many of these cases, as in *Fowlkes* v. *Ray-O-Vac, supra,* the state of the forum was also the state of the domicile. Although tort actions between members of the same family will ordinarily be brought in the state of the family domicile, the courts of another state will in some cases be a more convenient forum, and thus the question arises whether the choice of law rule should be expressed in terms of the law of the forum or that of the domicile. *We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile.* That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist."[3] (Emphasis supplied.)

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[3] This position is supported by eminent authority. Cheatham and Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 974-75 (1952); Ehrenzweig, Parental Immunity in the Conflict of Laws, 23 U. of Chi. L. Rev. 474-79 (1956). And see, Rabel, Conflict of Laws, a Comparative Study, 322 (1945); Cook, Logical and Legal

The holding in the *Emery* case was foreshadowed in *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 1025 (1935) in which an intermediate appellate court of California had before it a minor's contract to purchase land in California which the defendant minor sought to disaffirm on the ground of infancy. Prior to becoming a citizen of California, he was resident in the state of Oklahoma and there obtained a court decree conferring upon him: "the rights of majority concerning contracts" and authorizing and empowering him "to transact business in general with the same effect as if such business were transacted by a person over the age of majority". He was then nineteen years of age. Thereafter, he became a citizen of California, but before attaining the age of twenty-one entered into the contract in issue. In holding that the defense of infancy was good, the Court pointed out that the Oklahoma decree did not give the infant a legal status of majority and did not purport to do so but only conferred upon him a personal privilege effective only within Oklahoma, and, therefore, did not require California to give it full faith and credit except as it might relate to an Oklahoma transaction. The Court then applied the *lex loci domicilii*, the law of California, in the following language (at p. 484):

> "... The status of all persons within a state is exclusively a matter for that state to determine for itself. (Kinnier v. Kinnier, 45 N. Y. 535 [6 Am. Rep. 132].) In the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to this

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Basis of the Conflict of Laws, 250 (1942). See also, note, 57 Mich. L. Rev. 901 (1959); Comment, 9 Cath. U. of Am. L. Rev. 52, 57-60. It should be noted that the removal of the disability to sue under Section 25 of the California Civil Code is based upon the most important family relationship of all, marriage.

contract which was made in this state, and the respondent had acquired no status which exempted him therefrom."

Petitioners are at a loss to explain how the court below found this case to be more favorable to the respondent herein. Although it might be argued that the case represents merely an application of the *lex loci contractus*, the citation of the *Kinnier* case[4] leaves no doubt that the court intended to and did apply the law of the domicile.

Both the District Court and the Court of Appeals seem to reject the domicile rule on the ground that a California Court would not apply the domicile law to give to a noncitizen a longer tolling period than would be available to its own citizens. Indeed, both Courts express this in their opinions.[5]

However, there is at least one reported case wherein a California Court did apply the domicile rule to give to a noncitizen an advantage it could not have extended to its own citizens.

In *Bouton* v. *Villaria*, 138 Cal. App. 2d 642, 292 P. 2d 638 (1956), a California appellate court reversed a judgment in favor of defendant on the ground that the trial court had improperly charged the California doctrine of imputed negligence. In that case, plaintiff was seeking damage for personal injuries sustained in an automobile

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[4] *Kinnier* v. *Kinnier*, cited in the above opinion applied the *lex loci domicilii* to a marriage contract. See also, *Petition of Altman*, 138 N. Y. S. 2d 336 (1954) applying law of Israel to determine age at which infant could take possession of personalty located in New York; *Matter of Honeyman*, 117 Misc. 653, 192 N. Y. S. 910, aff'd 202 App. Div. 728, 193 N. Y. S. 936 (1922) applying law of Illinois; *Miller* v. *Miller*, 91 N. Y. 315, legitimacy.

[5] The constitutional aspects of this reasoning is treated hereinafter under Point III.

accident which occurred in California. Plaintiff, and her husband, who was driving the car in which she was riding, were citizens of Ontario, Canada. The appellate court noted that the law of California with respect to the imputation of the negligence of the husband to the wife was predicated upon the fact that in California the husband would have an interest in the wife's recovery. Therefore, the court reasoned that if, under the law of their domicile, Ontario, the husband would not have an interest in the recovery, then the reason for the California rule of imputed negligence did not exist. Looking to the domicile law the court found that under that law the husband did not have an interest in his wife's recovery, and, therefore, it was error to impute his negligence to his wife. The court, in its opinion, expressly conceded that if the husband and wife had been domiciled in California the result would have been different. This case clearly demonstrates that California would apply the *lex loci domicilii*, even though it would result in giving to a noncitizen an advantage that a citizen would not enjoy.

This court has admonished the Federal Courts since *Erie* v. *Tompkins, supra*, to search out and apply the local law, even though the Federal Court would favor some other rule. This obligation is not restricted merely to applying cases-in-point. The lack of a case-in-point does not give the Federal Court in a diversity case a license to search out and apply what it considers the majority rule or the better rule. Thus, Mr. Justice Reed, in a unanimous opinion written for this Court, observed in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 209 (1938):

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts

must now search for and apply the entire body of substantive law governing an identical situation in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include decisions of state courts, just as they would in a case tried in the state court, and just as they always have done in actions brought in the federal courts involving what were known as matters of 'local' law."

In *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940) Mr. Chief Justice Stone commented (at pp. 236-37):

"A state is not without law save as its highest court has declared it. *There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.* In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and *it is the duty of the former in every case to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear . . .*" (Emphasis supplied.)

Mr. Chief Justice Hughes, writing for a unanimous Court, in *Six Companies* v. *Joint Highway Dist. No. 13*, 311 U. S. 180 (1940), reversed a circuit court for disregarding what that court believed to be a dictum by a California appellate court, citing *West* v. *American Tel. & Tel. Co.*, *supra*. See also, *Meridith* v. *Winter Haven*, 320 U. S. 228, 237-38 (1943).

It is clear from the opinion of the Court below that it based its decision upon the erroneous premise that there was no relevant data or dicta in California to guide it and was at liberty, "despite general statements that matters of status are regulated by the law of the domicile", to apply what other courts "seem" to apply, i.e., the law of the forum. Aside from the question of the soundness or applicability of the cases and authority cited by the Court below for its position, the fact remains that the question before the Court was not what other courts might do, but what the California Courts would do, and on that question the Court below had clear authority in the California decisions for the domicile rule. There is nothing irrational, unreasonable or invalid in applying the *lex loci domicilii* to determine status and capacity. It is stated in *Corpus Juris Secundum* as the general rule,[6] and was followed in a recent case by the highest court of Louisiana. *Sun Oil Co.* v. *Guidry*, 99 So. 2d 424 (1958). This last cited case is directly in point. There the court was called upon to decide whether or not prescription had run against an infant domiciled in Texas on oil rights having a situs in Louisiana. In Louisiana prescription is tolled during the disability of infancy, which status continues until age twenty-one in Louisiana. In Texas, the infant had been completely emancipated by decree at age eighteen. Thus, the precise question presented was, as in the instant case, which law should be applied to determine the age at which the disabilities of infancy ceased? After a review of the cases and authority on the subject, the court applied the general rule that status

[6] 15 C. J. S., Conflict of Laws, §14b, pp. 907-08. See also, 43 C. J. S., Infants, §20, pp. 82-83. And see, Cook, The Logical and Legal Bases of the Conflict of Laws, 248, 345 (1949). At least one writer has concluded that there is no general rule, see, Schoenbach, Capacity of Minors and the Conflict of Laws, 17 Boston U. L. Rev. 623.

should be determined by the law of the domicile (Texas) and held, therefore, that disability ceased at age eighteen (at p. 428):

> "As we interpret the application of this rule to the present facts, the Texas decree fully emancipating Thornton at his domicile—a status recognized by Louisiana—is decisive that his personal status for purposes of Louisiana law is that of a fully emancipated minor."

Petitioners do not claim, nor is it necessary to a decision herein, that this conflicts problem is easily resolved or that the same result would be reached in all states and at all times, but petitioners do submit that all revelant data and dicta in California clearly mark the path which California would have followed as blazed in the *Emery* and *Deason* cases.

Although this court would give great weight to what the Court below, sitting in New York, would find to be the local New York law, it should be emphasized that the question herein involves California law. With all due respect to the Court below, it is submitted that the Court has not properly followed the rules of construction as laid down by this Court, which error can and should be corrected by this Court.

B. The Court Below, in Applying the Law of California to Determine Petitioner's Capacity to Sue, Ignored Its Own Rule 17(b) That the Party's Capacity to Sue Should Be Determined by the Law of the Domicile of the Party.

Rule 17(b), as far as here pertinent, has not been changed since it was originally promulgated as part of the Rules of Civil Procedure in 1938.

Prior to the Rules, the Federal Courts had no uniform civil procedural rules and, in general, followed the rules of practice and procedure of the local state courts. The coincidence of the *Erie* decision and the institution of the Federal rules within a few months of each other worked a revolution in diversity cases; what had been the rule in the *Swift* v. *Tyson* era, i.e., practice rules under local law and substantive common law rules under general Federal law, was reversed and substantive questions became matters of local law and procedural questions became a matter of Federal rules.

Prior to the Federal Rules and the *Erie* decision, the Federal Courts in New York applied the law of the forum to questions involving capacity of an individual to sue. *New York Evening Post* v. *Chaloner*, 265 F. 204 (C. C. A. 2d, 1920). This would seem to be in accord with local New York law, *Mertz* v. *Mertz*, 271 N. Y. 466, 474, 3 N. E. 2d 597 (1936). However, as promulgated by this Court, Rule 17(b) requires the Federal Courts to look to the law of the domicile to determine an individual's capacity to sue. It may be inferred that this Court felt this to be the better rule.

But what if there is a possible conflict between the Federal rules and the alleged local decisional law which would substantially affect the result? This question has been before this Court in one form or another on several occasions since the *Erie* decision and the sense of these decisions seems to be to discard the procedural-substantive dichotomy and to look to the result—if it would make a substantial difference the Rule must give way. *Guaranty Trust Co. of New York* v. *York*, 326 U. S. 99, Statute of Limitations; *Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208, burden of proof; *Palmer* v. *Hoffman*, 318 U. S. 109, contributory negligence; *West* v. *American Tel. & Tel. Co.*,

311 U. S. 223, accrual and termination of cause of action; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, right of corporation to sue; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, commencement of action.

However, in the interest of the uniform procedure which the Federal Rules of Civil Procedure were promulgated to compel, and to prevent a whittling away of that uniformity, he who would challenge the validity and applicability of a particular rule should have the burden of clearly showing that its application would prevent him from obtaining the same substantial treatment that he would obtain in the state court. Moore's Commentary on the U. S. Judicial Code (1949) 307-359; Clark, *Procedural Aspects of the New State Independence*, 8 Geo. Wash. L. Rev. 1230.

Even if it were deemed that the question here presented is a mixture of substance and procedure, nevertheless it is submitted that the Court below should have given great weight to Rule 17(b) and should have applied it unless there was a clear showing of conflict with the decisional law of California. As demonstrated in argument I-A, *supra*, all available decisional law of California shows uniformity, not conflict.

There is nothing in the statutory law of California to compel a contrary finding. The California tolling statute merely tolls the statute of limitations during the disability of minority—it is silent as to the duration of that disability. It is only by judicial construction that California has held that this disability ceases when an infant is married at age 18 and thereby acquires a capacity to sue in her own name, *Caraway* v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956). California has applied Section 25 to its own domiciled infants to determine this question (*Sears* v. *Majors*, 104 C. A. 60, 285 Pac. 321), but it has also clearly declared through its highest court that the question of capacity to

sue should be determined by the law of the party's domicile, *Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955). Thus, there is no conflict between the decisional law and the Rule. Yet, the Court below not only chose to ignore the clear implications of the California decisions, but did so in the face of the mandate of Rule 17(b).

Even assuming, for the sake of argument, that California decisional law is devoid of any guide to the choice of law problem here involved, the Court below should have followed the choice of law rule as embodied in Rule 17(b) rather than ignore it and seek out a rule which other courts "seem" to apply. The method followed by the Court below strikes at the heart and purpose of the Rules, uniformity in the Federal Courts.

II.

The Court below conflicted with decisions of this Court and with decisions of the local courts in barring the action of the infant daughter herein.

The Court below dismissed the action on behalf of the infant daughter herein on the ground that under controlling decisional law of California the action is deemed "joint" and if one heir is barred all are barred.

Section 377 of the California Code of Civil Procedure gives the right to bring the action for wrongful death to the "heirs or personal representatives". In 1890, the Supreme Court of California, in *Hartigan* v. *Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851, construed this Section as giving to the heirs a single, joint, indivisible action and held, therefore, that all the heirs must be joined in the action.

The precise issue involved herein did not come before a California Court until 1930, in *Sears* v. *Majors*, 104 Cal.

App. 60, 285 Pac. 321. In that case an intermediate appellate court of California held that if the widow was time-barred, then her children were also barred. The Court reasoned that, since the action was joint, if one heir could not bring the action, then none could. As authority for its holding the court cited cases and treatises which were not in point, but which merely stood for the general proposition that in a "joint" cause of action, all must be joined and that a defense going to the substance of the cause of action would be good against all joint owners. In 1936, another intermediate appellate court of California had this same question presented to it and it followed the *Sears* case without comment or analysis. *Haro* v. *Southern Pac. R. Co.*, 17 C. A. 2d 594, 62 P. 2d 441.

However, after the decision in the *Sears* case, the California Supreme Court in 1931, in *Bou* *Roos*, 213 Cal. 484, 2 P. 2d 817, held that the mere fact that one of the heirs was barred by reason of contributory negligence did not bar the remaining heir. There was no discussion or mention of the *Sears* case, apparently the parties did not bring this possible conflict in the lower appellate court to the Court's attention. However, the Court cited and quoted from an intermediate appellate court decision in *Bowen* v. *Kirjirian*, 105 Cal. App. 286, 287 Pac. 570, which was decided shortly after the *Sears* case, in 1930, by an appellate court in a different appellate division in California. In this case, the appellate court reasoned that since it had been held to be no bar to other heirs that one of the heirs could not establish any pecuniary loss,[1] the rule should be no different "because of the intervention of some other rule, such as contributory negligence."

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[1] *Rabe* v. *Western Union Tel. Co.*, 198 Cal. 290, 244 Pac. 1077 (1926), this case also held that the complaint could be amended to bring in omitted heirs even after the statute of limitations had run, id. at pp. 298-300.

The *Bowen* and *Bowler* cases were cited with approval by the California Supreme Court in a subsequent case in 1952, *Flores* v. *Brown*, 39 Cal. 2d 622, 248 P. 2d 922. Then, in 1956, the question again arose in *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956). In that case the appellate court did not content itself with merely citing the *Bowen* and *Bowler* cases, but discussed the problem anew (at p. 543):

> "When it is said that an action for wrongful death is *joint* it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is *single* it is meant that only one action for the wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that the action is *indivisible* it is meant that there cannot be a series of suits by heirs against the tort feasor for their individual damages. But while a 'lump sum' verdict is required, the total recovery is the aggregate of the pecuniary loss of each of the heirs entitled to recover by reason of the death of the deceased—the damages of each are added to produce the total (Estate of Riccomi, 185 Cal. 458, 461 [197 P. 97, 14 A. L. R. 509]) . . ." (Emphasis the court's.)

Thus, it clearly appears that the concept and effect of a "joint" cause of action as applied in the *Sears* and *Haro* cases has been completely abandoned and would no longer be applied and should not have been applied in the instant case.[8] Surely, if contributory negligence, which bars the right itself, does not bar the rights of the other heirs, then a

[8] It is clear that California considers the joint nature of the action as procedural, intended to prevent a harassment of the defendant by multiplicity of suits. Thus, it has been held that

time bar, which California considers procedural and merely barring the remedy, should not bar the other heirs (see, *Wohlgemuth* v. *Meyer*, 193 C. A. 2d 326, 293 P. 2d 816 (1956)).

It is submitted that the instant case represents the converse of the situation in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), where it was conceded that there was no developing line of authorities in Vermont courts to cast doubt on the decisions in point. Here, to paraphrase the language of Mr. Justice Douglas in the *Bernhardt* case (at p. 205), there is a developing line of authorities that casts a shadow over the established ones, there are dicta, doubts and ambiguities in the opinions of the Calfiornia judges on the question. In fact, in the instant case, the *Haro* and *Sears* cases cannot be considered "established authorities". Rather, these cases appear to be anomalies; the main stream of California law is represented by the *Bowen, Bowler, Flores* and *Perkins* cases.

The Court below conflicted with decisions of this Court when it stated with reference to these cases, "It is not for us to say whether the two lines of cases are logically reconcilable." *Meridith* v. *Winter Haven*, 320 U. S. 228 (1943); *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940). And see, Kurland, *Justice Frankfurter and the Erie Doctrine*, 67 Yale L. J. 187, 204-214. On the contrary, it was for the Court below to say whether these cases were logically reconcilable, and if they were not, to choose that line of reasoning which it felt the highest court of California would follow today. And on this question, it is submitted, the

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defendant must make timely objection as to nonjoinder, *Salmon* v. *Rathjens*, 152 Cal. 290, 92 Pac. 733. In that case, the Court pointed out that defendant was not prejudiced if all heirs were not joined, since the judgment in that action would be a bar to any subsequent suits by other heirs. Applying the same reasoning to the instant case the defendant herein could not be prejudiced since all possible heirs of the decedent have joined in this action.

rationale of the more recent cases, which are bottomed on a decision of the highest court in the *Bowler* case, clearly indicates that the highest court of California would not follow the intermediate appellate court decisions in the *Sears* and *Haro* cases.

III.

Section 13 of the New York Civil Practice Act has been so construed and applied herein by the Court below as to violate petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution.

The Court below has construed and applied Section 13 of the Civil Practice Act in such a way as to deprive petitioners of reasonable access to the Courts of New York based upon their noncitizenship.

The Court below refused to apply the domicile rule although clearly adopted by the California Courts, on the ground that: "When the California Legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same . . . " Thus, it is clearly apparent that the Court below based the application of Section 13 on a domicile or citizenship basis. This is exactly what the Court of Appeals, in upholding the constitutionality of Section 13, stated should not be done. *Klotz* v. *Angle*, 220 N. Y. 347 (1917). The Court below held, in effect, that New York, in "borrowing" California law, could and would find that California Courts could and would discriminate against noncitizens, that California, even if it would apply the *lex loci domicilii* when its own citizens were involved would apply some other rule when noncitizens were involved. This is plainly a violation of the privileges and

immunities clause of the Constitution. *Travis* v. *Yale and Towne M/g. Co.*, 252 U. S. 60 (1920).

It is well settled that among the privileges and immunities guaranteed to a citizen under Article IV, §2, of the Constitution is a right of reasonable access to the Courts of a state, at least to the extent that it is allowed to its own citizens. *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 148 (1907); *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233 (1934); *Miles* v. *Illinois C. R. Co.*, 315 U. S. 698, 704 (1942).

Although a reasonable discrimination by the courts of a state against nonresidents does not violate the privileges and immunities clause, the courts must at least give the nonresident reasonable and adequate access to its courts for the enforcing of any rights he may have. *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553 (1920). In the last cited case, this Court passed upon a "borrowing" statute similar to Section 13. In that case, this Court found that even applying the borrowed limitation period, the plaintiff had at least a year in which to sue in the forum state. The question of infancy was not involved and, presumably, plaintiff had complete access in his own name for that period.

In the instant case, however, petitioners were still considered infants when barred, both under the law of their domicile, South Carolina, and the law of the forum, New York.[9] Under the laws of New York, these infants had no capacity to sue or be sued, except through a Guardian *ad Litem*.[10] The tolling of statute of limitations during in-

[9] South Carolina Code, Vol. 1, §10-104(1); New York Civil Practice Act, §60. It has not been disputed that if petitioners had been domiciled in New York the action herein would have been timely. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (C. A. 2d, 1949).

[10] New York Civil Practice Act, §236.

fancy is almost universally applied in this country, and is premised upon the self-evident fact that an infant has not reached sufficient physical and mental maturity to be capable of adequately understanding his rights or protecting them. It is no answer to point out, as the Court below did, that petitioners could have sued through a Guardian *ad Litem* before they reached majority (New York Civil Practice Act, §§201-06). This begs the issue. The point is that even this provision is intended to afford the infants further protection; this is a shield, not a sword to be used against them. This is given to an infant as an alternative, to be used *if* the infant becomes aware, or is apprised, of his rights and chooses to exercise or enforce them before reaching majority. This alternative remedy does not toll the statute of limitations, for the obvious reason that the infant may not become aware of his rights and the limitations to them. As indicated in the *Emery* case, it is most appropriate that the state of domicile determine this matter.

In the instant case, the infant petitioners were barred from the New York Courts even before they became aware of their rights and obtained the appointment of either a representative of the estate or a Guardian *ad Litem*. This is not reasonable access.[11]

[11] See generally, Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L. J. 1323-91, and see particularly, id. at pp. 1379-89

CONCLUSION

The Court below acknowledged that it was its duty "to blaze the trail of the foreign law that it has been directed to follow". However, in doing so, it ignored the guide lines that this Court set down for the Court below to follow. It applied its own choice of law rule to bar the infant widow in the face of decisional law and the mandate of Rule 17(b) to the contrary, and it then blindly followed two older intermediate court decisions to bar the infant daughter, although there were cases of both the intermediate and highest court clearly indicating that the older cases would no longer be followed. And, in reaching this result, the Court below abridged the petitioners' constitutionally guaranteed privilege of reasonable access to the courts of New York.

PRAYER

For the foregoing reasons, petitioners pray that the judgment of the Court of Appeals be reversed and that the petitioners be granted such other and further relief as this Court deem proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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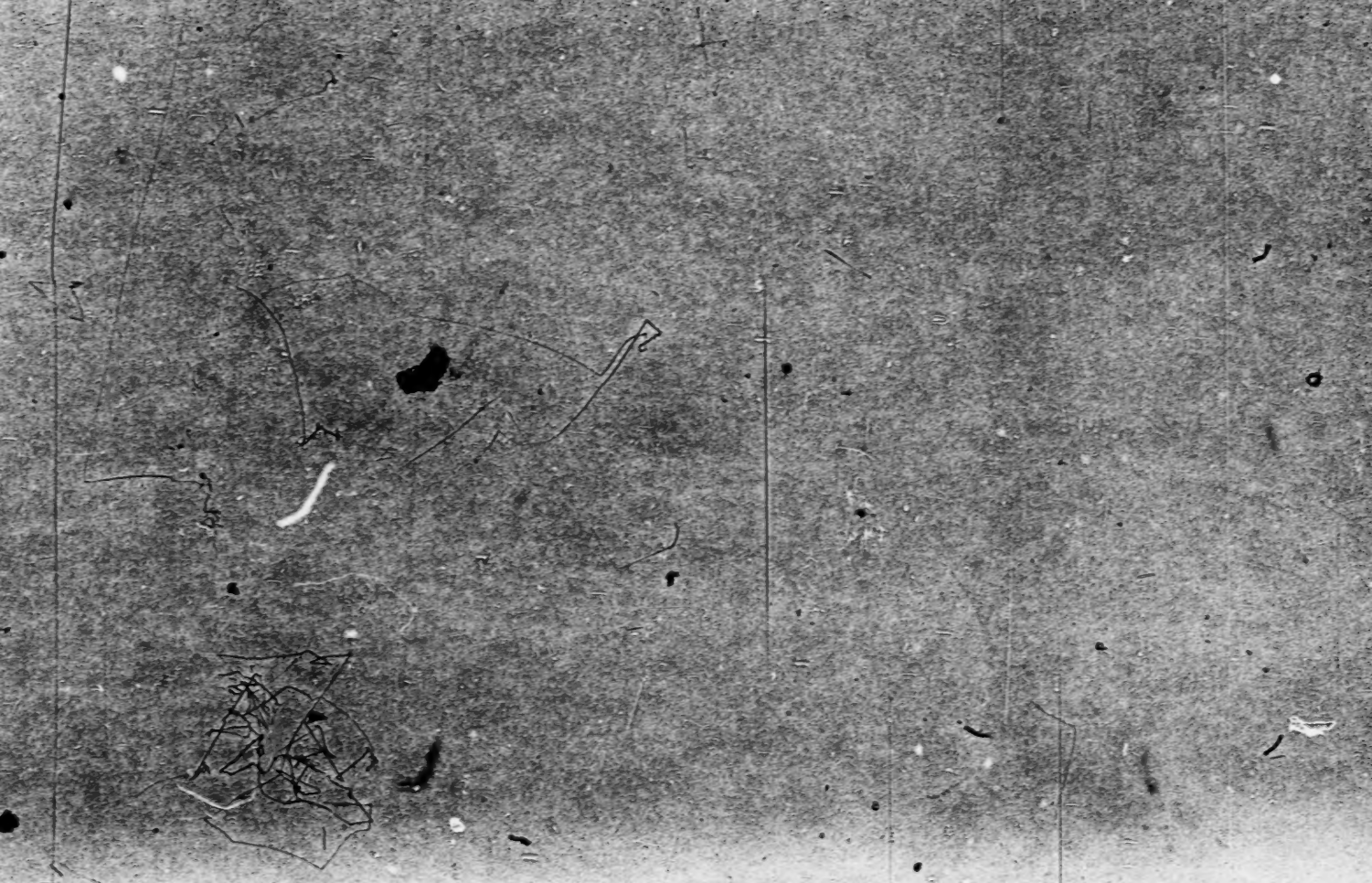

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

against

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Questions Presented

1. In this diversity of citizenship case, did the federal courts sitting in New York correctly apply New York law and California law to the alleged wrongful death of petitioners' decedent who was killed in an airplane accident in California?

2. Did the lower courts correctly construe California statutes and California decisions in holding

that the widow reached her majority at the age of eighteen years; that California's one year statute of limitations commenced to run at that time and upon expiration of such one year period any cause of action based on decedent's wrongful death was barred to her and her daughter?

3. Is Rule 17(b) of the Federal Rules of Civil Procedure relevant to a determination of the applicable period of the statute of limitations, and, if so, can it be construed in such a manner as to bring about a different result in a federal court from that in a California state court?

4. Does Section 13 of the New York Civil Practice Act provide reasonable access to New York courts where the petitioners had two and a half years in which they could have instituted suit through a guardian *ad litem* prior to being barred by the statute?

New York Statute Involved

CIVIL PRACTICE ACT

"§ 13. Limitation where cause of action arises outside of the state

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

California Statutes Involved

The Code of Civil Procedure of the State of California:[1]

Part 2, Title 3

OF THE PARTIES TO CIVIL ACTIONS

"§ 377. Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under

[1]The California courts have held that in interpreting sections of their Code of Civil Procedure, title, chapter and section headings should be given effect according to their import to the same extent as though they were included in the body of the law. *Gonzales* v. *Superior Court*, 3 C. 2d 260, 44 P. 2d 320 (1935); *People* v. *Fink*, 121 Cal. App. 14, 8 P. 2d 493 (1932); *In re Forthmann*, 118 Cal. App. 332, 5 P. 2d 472 (1931).

Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court.* * *"

Part 2. Title 2

Chapter 1

THE TIME OF COMMENCING ACTIONS IN GENERAL

"§ 312. General limitations; special cases

Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

Chapter 3

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY

"§ 335. Periods of limitation

PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

* * * *

§ 340. One year

Within one year:

* * * *

3. Libel, slander, assault, battery, false imprisonment, seduction, wrongful death, forged or raised check, injury to animal by feeder or veterinarian. An action for libel, slander, assault, battery, false imprisonment, seduc-

tion of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act of or neglect of another, * * *"

Chapter 4

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS

"§ 352. Disabilities of minority, insanity, imprisonment, and marriage; effect on limitation period

EXCEPTION, AS TO PERSONS UNDER DISABILITIES. If a person entitled to bring an action, mentioned in Chapter 3 of this Title, be, at the time the cause of action accrued, either:

1. Within the age of majority;

* * * *

—The time of such disability is not a part of the time limited for the commencement of the action."

The California Civil Code:

Part 1

"§ 25. Minors defined; exception of married females over 18; effect of annulment

Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who

has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting her marital status, the same as if she was 21 years of age.* * *"

Statement of the Case

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as guardian *ad litem* of her minor child (R. 2, 8, 9). Jurisdiction of the district court was predicated on diversity of citizenship, the administrator being a citizen of New York, the widow and her minor child being citizens of South Carolina and the defendant being a California corporation (R. 4). The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, § 377 (R. 6, 7).

Defendant's motion for summary judgment upon the ground that the action was barred by the California statute of limitations was granted by Levet, J., in an opinion and order (R. 33-39, 173 F. Supp. 114) which was entered as a judgment on May 14, 1959. The judgment was unanimously affirmed by the Second Circuit in an opinion by Friendly, J. (R. 42-50, 276 F. 2d 280) entered on March 2, 1960.

For the purposes of this review, the following facts, as found by Judge Levet (R. 34-35), are undisputed:

1. The widow, Marjory M. Hall, was born November 17, 1936.

2. The decedent, Jasper Wallace Hall, was born March 2, 1934.

3. The marriage took place on December 26, 1951, in South Carolina.

4. Judith Marie Hall, the child of this couple, was born December 2, 1952.

5. The death of Jasper Wallace Hall took place on March 20, 1953, in the State of California.

6. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.

7. The administrator was appointed on February 18, 1958.

8. The action was commenced in the United States District Court for the Southern District of New York on November 7, 1958.

9. The widow is a resident of Charleston, South Carolina.

Summary of Argument

I. In accepting the borrowed statute of limitations the courts below were required to apply it with all its accouterments including its tolling provisions. Since the statute was tolled only while the widow was "within the age of majority", the courts below properly looked to the California statutes to determine when she reached the age of majority. It could not reasonably have been the intention of the California legislature to leave the definition of "majority" to the laws of the states of non-residents seeking to enforce a California cause of action in a California court and thus extend to a non-resident a longer period within which to bring suit than that extended to its own residents. Moreover, there is no question here with respect to capacity to sue at the time the action was instituted and Rule 17(b) of the Federal Rules of Civil Procedure has no bearing on the instant case.

II. The courts below properly followed the California cases which are squarely in point in barring the action of the infant daughter.

III. All that the "privileges and immunities" clause of the Constitution requires is that nonresidents be given reasonable and adequate access to the courts of New York. The right extended to the widow to enforce her claim by a guardian *ad litem* was reasonably sufficient and adequate.

ARGUMENT

I

The Courts below correctly applied New York law, the law of the forum, and in turn, California law, the lex locus delicti, in determining the rights of the parties in this wrongful death action having its situs in California.

There is no dispute here as to the general principles applicable to this diversity action brought by non-residents of New York upon a cause of action for wrongful death arising in California. Petitioners and respondent are in basic agreement that the lower courts were required to apply the law of New York, including the conflict of laws rules and statute of limitations of that state. *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). Under the New York conflict of laws rule any substantive right of action which petitioners may have for the alleged wrongful death of their decedent is governed by the laws of California. *Baldwin* v. *Powell*, 294 N. Y. 130, 61 N. E. 2d 412 (1945). Under the borrowing provisions of the New York statute of limitations this action cannot be enforced in the courts of New York if it is barred by the statute of California. New York Civil Practice Act, Section 13. In accepting the borrowed statute of limitations, the New York courts, and the federal courts sitting in New York, will apply it with all its accouterments, including its tolling provisions. *American Surety Company of New York* v. *Gainfort*,

219 F. 2d 111 (2 Cir. 1955). The basic question presented to the lower courts, therefore, as petitioners point out at page 11 of their brief, was whether petitioners would have been barred in California if their suit had been brought there instead of in New York.

A. The widow's age of majority under California law is the essential consideration in this case.

The basic California statutory provision with respect to the time limitations for the commencement of civil actions is clear and unambiguous. Section 312 of the California Code of Civil Procedure expressly provides that civil actions "without exception" can only be commenced within the periods prescribed in that title of that code, unless where, in special cases, "a different limitation is prescribed by statute." Under Section 340(3) of the same Code of Civil Procedure, an action for wrongful death must be commenced within one year from decedent's death, and under Section 352 this one year limitation is tolled if the person entitled to sue is "within the age of majority". Under Section 25 of the California Civil Code, any female who has contracted a lawful marriage and thereafter reaches the age of eighteen years, shall, upon reaching the age of eighteen years, be of the age of majority and be deemed an adult person for the purpose of entering into any "transaction respecting property" the same as if she was twenty-one years of age.

The California courts have held that the phrase, "transaction respecting property", as contained in Section 25 of the California Civil Code, includes the bringing of an action for wrongful death and that a

widow over the age of eighteen years is under no disability to bring such an action. In *Haro* v. *Southern Pac. R. R.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936), the widow was over the age of eighteen years at the time of the death of her husband and under twenty-one years of age when the action was instituted. The court referred to Section 25 of the Civil Code and, after citing several cases construing the words "transaction" and "property", concluded (p. 597):

> "It would seem, therefore, that the phrase 'transaction respecting property' includes within its definition the bringing of an action by a widow for the wrongful death of her husband. That being true, Mrs. Haro was under no disability that would prevent her from suing for the damages suffered from the wrongful death of her husband at any time during the year following his demise. As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Proc.)"

The *Haro* case, *supra*, was subsequently cited and followed in *Caraway* v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956), in which the court said (pp. 328-329):

> "The point was decided against plaintiff's contention in *Haro* v. *Southern Pac. Co.* (1936), 17 Cal. App. 2d 594 [62 P. 2d 441], a wrongful death action by a widow, 19 years old when her husband died, instituted more than one year after his death but before she reached the age of 21. The court held that the phrase 'transaction respecting property' in Civil Code section 25 includes the bringing of an action for wrongful death, that she

> therefore was under no disability preventing her to bring the action at any time during the year following his death and that at the end of that year the action was barred by the statute (p. 597). The Supreme Court denied a hearing. Appellant's attacks on this decision and her contention that it has lost authority because of an amendment made in 1953 in section 25, *supra*, are without merit."

Thus, it is clear that a California court would read Section 25 of the Civil Code together with Section 352 of the Code of Civil Procedure in determining the period during which a married woman was "within the age of majority" for the purpose of tolling the statute of limitations.

Petitioners seek to avoid the operation of this rule, which they implicitly admit would be applicable if the widow were a resident of California, by urging that in determining the period of disability the California courts would look to the law of the widow's domicile, not to the law of California. In support of this argument they place great reliance upon the cases of *Emery* v. *Emery*, 45 C. 2d 421, 289 P. 2d 218 (1955), and *Deason* v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025 (1935). However, as the courts below pointed out (R. 39, 47), the *Deason* case does not support their position, since the California court gave effect to its own statute on minority, even as to one who had previously acquired the rights of majority under the law of his domicile for the purpose of entering into contracts. Nor does the *Emery* case support the position advanced by petitioners, since the California court was quite explicit in delineating the limitations

of its holding. In the language emphasized by petitioners at page 13 of their brief, the court specifically stated that disabilities due to family relationship are more properly determined by reference to the law of the state of the family domicile. Whether or not this represents an exception to the general rule with respect to disabilities due to family relationship, it can hardly be argued that disabilities involving the statute of limitations would fall within the same category.

In support of their contention that California would give to a noncitizen an advantage it could not have extended to its own citizens, petitioners cite the case of *Bruton* v. *Villoria*, 138 C. A. 2d 642, 292 P. 2d 638 (1956). However, analysis of that case discloses that the court was merely applying its own law with respect to contributory negligence to a case where the husband had no interest in the wife's recovery for her own personal injuries. In order to apply that rule the court had to determine the ownership of the cause of action and followed its own conflict of laws rule of looking to the law of the domicile as controlling as to ownership of personalty. The same rule concerning contributory negligence would be applied to California residents and nonresidents alike if, due to other circumstances, the property interest of the other spouse has ceased.[2] Therefore, it is not correct to say that the California court was discriminating against its own citizens. It was applying a uniform rule of evidence and the need to look to the law of plaintiffs' domicile to determine ownership of personal property was governed by a well-settled con-

[2]Two such examples are when the marriage relationship ceases due to death or when the negligence occurred prior to marriage

flict of laws rule which has no relevance to the present case.

Contrasted with the California cases cited and relied upon by petitioners are the cases of *Smith* v. *Sheplar*, 8 C. A. 2d 717, 48 P. 2d 999 (1935), and *Bicwend* v. *Bicwend*, 17 C. 2d 108 (1941), which leave little doubt as to the law that the California courts would apply in the present case. In the *Smith* case, the appellate court stated (p. 720):

> "It is true as to procedure and pleading, the foreign plaintiff appearing in our courts must follow the California law. He is subject to the period of our statute of limitations regardless of the period of similar statutes in his jurisdiction. (*Royal Trust Co.* v. *MacBean*, 168 Cal. 642 [144 Pac. 139]), except as provided by section 361 of the Code of Civil Procedure."[3]

Similarly, in the *Bicwend* case, the California Supreme Court stated (p. 114):

> "It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. (*McElmoyle* v. *Cohen*, 38 U. S. [13 Pet.] 312, [10 L. Ed. 177]; *Townsend* v. *Jemison*, 50 U. S. [9 How.] 407 [13 L. Ed. 194]; *Royal Trust Co.* v. *MacBean*, 168 Cal. 642 [144 Pac. 139]; *Miller* v. *Lane*, 160 Cal. 90 [116 Pac. 58].)"

Section 25 of the California Civil Code defines in clear and unequivocal language the limits of minority

[3]Section 361 of the Code of Civil Procedure is the California "borrowing" statute of limitations

and specifically states that a female who contracts a lawful marriage and thereafter reaches the age of eighteen years "shall be of the age of majority" upon reaching the age of eighteen years. When the California legislature drafted the disability provision of Section 352 of the Code of Civil Procedure and set the period "within the age of majority" as the limiting time and then spelled out that period in the Civil Code, the only reasonable interpretation is that they were to be read together, as was obviously done in *Haro* v. *Southern Pac. R. R.*, *supra*, and *Caraway* v. *Burns*, *supra*. Indeed, the California courts have held that the provisions of the California codes must, as far as reasonably possible, be construed as though they were parts of the same statute. *Arques* v. *National Superior Co.*, 67 C. A. 2d 763, 155 P. 2d 643 (1945). It could not reasonably have been the intention of the California legislature to leave the interpretation of the word "majority" as used in Section 352 of the Code of Civil Procedure to the laws of the states of nonresidents attempting to enforce a California cause of action in a California court. Accordingly, the application of Section 25 of the Civil Code with the tolling provisions of Section 352 of the Code of Civil Procedure under the "accouterments" doctrine enunciated in *American Surety Company of New York* v. *Gainfort*, *supra*, is the only reasonable application of said doctrine.

B. Rule 17(b) of the Federal Rules of Civil Procedure has no bearing here since the question is not one of capacity but of possession of a cause of action.

It is difficult to perceive what bearing Rule 17(b) of the Federal Rules of Civil Procedure, which speaks of capacity to sue or be sued, has on the instant case. That rule can have no effect until an action is commenced in the federal court. There is no dispute here that the widow was over the age of twenty-one years and thus had "capacity to sue" under the law of South Carolina when this action was commenced.[4] The issue here has to do solely with the period during which a cause of action governed by the laws of California is to remain alive. Petitioners are confused between "legal capacity to sue" and possession of a "cause of action."[5] California alone gave the substantive and remedial rights which could have been exercised by decedent's widow within one year after reaching her eighteenth birthday, regardless of what her status may have been in South Carolina.

Moreover, in view of this Court's decision in *Guaranty Trust Co.* v. *York, supra,* it would seem abundantly clear that Rule 17(b) of the Federal Rules of Civil Procedure can have no application to the issues involved here. In that case, Mr. Justice Frankfurter, in delivering the majority opinion, pointed out that particular rules of local law "do not in the slightest change the crucial consideration that if a plea of the

[4]South Carolina Code, Volume 1, § 10-104(1).

[5]"The law recognizes 'capacity to sue' as the plaintiff's personal right to come into court, and his 'cause of action' as his right to relief under the facts of the case he brings." *Magee* v. *McNary,* 10 F. R. D. 5, 11 (W. D. Pa. 1950).

statute of limitations would bar recovery in a state court, a federal court ought not to afford recovery." 326 U. S. 99, 110.

In a somewhat analogous situation in *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530 (1949), this Court held that the Federal Rules of Civil Procedure could not in effect extend a state statute of limitations in a diversity case when that statute had run according to applicable state procedure, stating (pp. 533-534):

> "* * * Here, * * * there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court [citing cases]. It accrues and comes to an end when local law so declares [citing cases]. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed.
>
> We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without add-

ing something to the cause of action. We may not do that consistently with *Erie R. Co.* v. *Tompkins.*"

Here, as has been demonstrated in argument I-A, *supra*, California has held that the disability of being "within the age of majority" ceases when a lawfully married female reaches the age of eighteen years, and petitioners' repeated references to *Emery* v. *Emery*, *supra*, as a pronouncement by the highest court of California that the question of capacity to sue should be determined by the law of the party's domicile, do not alter the fact that the only disabilities involved in that case were those due to family relationship and not disabilities involving the statute of limitations.

II

The Courts below were clearly correct in following California cases which are squarely in point with respect to the claim of the infant daughter.

As petitioners point out at pages 22 and 23 of their brief, the California courts have expressly held that if a cause of action for wrongful death under Section 377 of the California Code of Civil Procedure is time-barred as to the widow, it is also barred as to her children.

In *Scars* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321 (1930), the infant son was fifteen years of age at the time of his father's death and nineteen years of age when the action was commenced, both parties agreeing that the mother was barred by the statute of limitations. It was argued on behalf of the plaintiffs that

the infant's action was not barred by reason of the tolling of the statute of limitations on the ground of infancy, and it was further urged that if the cause of action was saved as to the infant, it was saved as to the mother. The court rejected this argument, stating (p. 62):

> "In reply, the defendants assert that a single joint cause of action is given to the heirs by section 377 of the Code of Civil Procedure, and that the language of the statute permits of no other construction. (Civ. Code, sec. 1431; Salmon v. Rathjens, 152 Cal. 290, 294 [92 Pac. 733].) Continuing, they claim that the action being barred as to all excepting the infant, that it was also barred as to him. We think the contention is well founded."

To the same effect is *Haro* v. *Southern Pac. R. R.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936), *supra*, where the widow sought damages on behalf of herself and her minor children for the wrongful death of her husband. After determining that the widow had not been under any disability to bring the action within one year after the death, the court stated (p. 597):

> "As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Pro.). As her cause of action is barred the causes of action of the other plaintiffs are also barred. (*Sears* v. *Majors*, *supra*.)"

A third holding of the California courts on the same point is *Gates* v. *Wendling Nathan Co.*, 27 C. A. 2d 307, 81 P. 2d 173 (1938), another action brought under the California wrongful death act more than a

year after the death, and in which the court stated (p. 315):

> "The further contention that the statute has not here run because one of the plaintiffs is a minor is squarely answered by the opinion of the court in *Haro* v. *Southern Pac. R. R. Co.*, 17 Cal. App. (2d) 594, 595 [62 Pac. (2d) 441], following *Sears* v. *Majors*, 104 Cal. App. 60 [285 Pac. 321]."

Petitioners, while admitting that the first two cases, above mentioned, are squarely in point, attempt to defeat their applicability to the facts in the case at bar by referring to a line of cases, none of which involve the statute of limitations, which they contend cast doubt upon the course which would be followed by a California court today, to wit: *Bowler* v. *Ross*, 213 Cal. 484, 2 P. 2d 817 (1931); *Bowen* v. *Kizirian*, 105 Cal. App. 286, 287 Pac 570 (1930); *Flores* v. *Brown*, 39 C. 2d 622, 248 P. 2d 922 (1952); and *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956).

Petitioners argue that since the court in the *Bowler* case (holding that the contributory negligence of one heir did not bar the remaining heirs) adopted the reasoning of the *Bowen* case, which was decided by a different appellate court than that which decided the *Sears* case, the holding of the *Sears* case is to be considered an anomaly. However, petitioners fail to point out that it was the same appellate court which decided *Bowen* in 1930 that decided the *Haro* case, *supra*, in 1936, and the *Gates* case in 1938, which expressly followed the holding in both *Sears* and *Haro*. In neither *Haro* nor *Gates* did that appellate court mention its holding in *Bowen*, and apparently it saw

no conflict between the two lines of cases. Moreover, the mere fact that *Bowen* and *Bowler* were cited with approval by the California Supreme Court with respect to contributory negligence in *Flores* v. *Brown*, *supra*, is no indication that that court saw any such conflict, nor does the language quoted by petitioners at page 24 of their brief from *Perkins* v. *Robertson*, *supra*, indicate any conflict. On the contrary, the *Perkins* case not only did not attempt to change the rule laid down in the *Sears*, *Haro* and *Gates* cases, but it affirmatively concurred that the cause of action created by Section 377 of the California Code of Civil Procedure "is a joint one, a single one and an indivisible one." 140 C. A. 2d 536, 542.

Petitioners also argue that the lower courts failed to follow the mandate set down by this Court in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940), by failing to state whether the two lines of cases were logically reconcilable. However, neither the *West* case nor any other pronouncement of this Court requires the lower courts to attempt such reconciliation when, as here, they followed the "California decisions that are directly in point" rather than "other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities" (R. 50).

III

No privileges and immunities of petitioners have been violated since they were given reasonable and adequate access to the courts of New York.

Petitioner's contention that the construction given to Section 13 of the New York Civil Practice Act by the courts below, violates the privileges and immunities clause of the Constitution of the United States is not valid. The constitutionality of Section 13 (then 390a of the Code of Civil Procedure) was upheld in *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917), where the Court of Appeals considered the question of the discrimination of the statute against a nonresident and held that such discrimination was not unconstitutional. Certainly, Section 13 gives the petitioners no less a right than they would have had had the action been brought in California rather than in New York.

This Court has said that in dealing with matters of local policy it will be slow to depart from local judgment in the absence of clear and compelling evidence of unconstitutionality. *Clyde* v. *Gilchrist*, 262 U. S. 94 (1923); *Atlantic Coast Line R. R.* v. *Phillips*, 332 U. S. 168 (1947).

The constitutionality of a Minnesota statute substantially similar to Section 13 of the New York Civil Practice Act was upheld by this Court in *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920). In that case, it was stated that the "privileges and immunities" clause of the Constitution, Article IV, §2, is satisfied (p. 562):

"[I]f the non-resident is given access to the courts

> of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

Here, the widow could have enforced any rights she may have had under California law in the courts of New York at any time following her husband's death and prior to her nineteenth birthday by a guardian *ad litem;* New York Civil Practice Act, Sections 201-206. Thus, for a period of more than two and one-half years from the time her cause of action accrued, the widow was given all the rights she would have had as a resident of New York, including the right of access to the New York courts by a guardian *ad litem.*

Petitioners do not contend that the period of time during which the New York courts were available to them was unreasonable. Rather, they argue that it was unreasonable to require them to institute their suit through a guardian ad litem, as provided for in Section 236 of the New York Civil Practice Act. However, in *Vance* v. *Vance,* 108 U. S. 514 (1883) this Court held that there was no inherent right in an individual to have a statute of limitations tolled during infancy.

The discrimination which results from Section 13 of the New York Civil Practice Act is not due to a policy of "creating an arbitrary or vexatious discrimination" against non-residents of New York, a policy consideration which this Court found important in *Canadian Northern Ry* v. *Eggen,* 252 U. S. 553, *supra.* The statute is an attempt by New York

to prevent "forum shopping" whereby a litigant who has failed to prosecute his rights within the period prescribed by the statute of limitations where the cause of action arose searches out other jurisdictions where more favorable treatment is available. This Court recognized the evil of forum shopping in *Erie R. R.* v. *Tompkins, supra.*

The policy considerations which the legislature of New York found compelling in passing a statute which closed the courts of New York to non-residents who failed to prosecute their action within the time specified by the jurisdiction which created the cause of action should not be ignored in this instance.

On the other hand it is respectfully submitted that if the exception accorded by Section 13 of the New York Civil Practice Act to New York residents were to be declared unconstitutional it would not benefit petitioners but would only deprive New York residents of future benefits of the exception.

CONCLUSION

The summary judgment dismissing the complaint was properly granted in the case at bar and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1960.

Robert F. Nolan, Administrator, et al., Petitioners, v. Transocean Air Lines.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Per Curiam.

This action was brought in the United States District Court for the Southern District of New York to recover damages for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant-respondent Transocean Air Lines. Plaintiffs, petitioners here, are the decedent's South Carolina-appointed administrator, decedent's widow, and decedent's minor child, who sues through the widow, her mother, appointed her guardian *ad litem* by the District Court. Federal jurisdiction was predicated solely on diversity of citizenship—the administrator being a New York resident, the widow and child South Carolina residents, the airline a California corporation with its principal place of business in California—and the substantive basis of the claim was California's wrongful death Statute, Cal. Code Civ. Proc. § 377, made applicable by the New York choice-of-law rules, see *Baldwin* v. *Powell*, 294 N. Y. 130, 61 N. E. 2d 412, which govern this diversity action. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487. The defendant, by its answer, set up the Statute of Limitations, and subsequently moved for summary judgment on the ground that the action was time-barred. Enforcing the one-year limitations period deemed controlling under Cal. Code Civ. Proc. § 340, brought into operation by New York's "borrowing stat-

ute," N. Y. Civ. Prac. Act § 13, the District Court held that the statute had run as to the widow, and hence that the child and the administrator were also barred under the California doctrine announced by California District Courts of Appeal in *Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321, and *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441; that where one beneficiary of a wrongful death claim is time-barred, all beneficiaries are time-barred, the cause of action being "joint." 173 F. Supp. 114. There was no decision on this precise point by the Supreme Court of California; that court had left *Sears* and *Haro* undisturbed. See also *Gates* v. *Wendling Nathan Co.*, 27 Cal. App. 2d 307, 81 P. 2d 173; *Glavich* v. *Industrial Accident Comm'n*, 44 Cal. App. 2d 517, 112 P. 2d 774 (dictum). The District Court's order granting the motion for summary judgment was affirmed by the Court of Appeals for the Second Circuit. 276 F. 2d 280. We granted certiorari. 363 U. S. 836.

The writ brought here several points decided adversely to petitioners below. We need discuss only one issue, for its determination disposes of the case. The *Sears* and *Haro* cases, regarded by the District Court and the Court of Appeals as controlling, the effect upon a claim for wrongful death of the running of the Statute of Limitations upon one but not upon another of the decedent's heirs (the latter being under a limitations-tolling disability), were decided in 1930 and 1936, respectively, and *Gates* in 1938, by California District Courts of Appeal. In December 1959, the Supreme Court of California, in bank, decided *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 347 P. 2d 12, which, in considered dictum construing Cal. Code Civ. Proc. § 352, stated: "If the cause of action were a joint one, the statute would be tolled as to both. 'If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action

arose, it is not barred as to either of the other parties.'" *Id.*, at 208–209, 347 P. 2d, at 22.

This case was handed down after the District Court's ruling granting summary judgment for respondent in the present litigation, and only shortly before argument in the Court of Appeals. It was not brought to the attention of, and was not considered by, the Second Circuit. Inasmuch as the view expressed therein by the highest court of California may be decisive of an issue critical to petitioners' claim, and inasmuch as the Court of Appeals for the Second Circuit is charged with mandatory appellate review in the present case, that court should decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of District Courts of Appeal between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959). We set aside the judgment of the Court of Appeals and remand to that court for reconsideration of the case in light of the new factor introduced by *Leeper* v. *Beltrami*, *supra*.

So ordered.